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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 221

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE, APPELLANTS

vs.

F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN SHEEP COMMISSION COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

FILED JULY 25, 1938

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[Citation in usual form showing service on Frederick H. Wood and John B. Gage omitted in printing.]

2 In United States District Court for the Western Division of the Western District of Missouri

In Equity. No. 2338

FRED O. MORGAN, DOING BUSINESS AS FRED O. MORGAN SHEEP COMMISSION COMPANY, PETITIONER

vs.

UNITED STATES OF AMERICA AND SECRETARY OF AGRICULTURE,
DEFENDANTS

Petition

Filed July 19, 1933

To the Honorable the Judges of the District Court of the United States for the Western Division of the Western District of Missouri:

Your petitioner, Fred O. Morgan, doing business as Fred O. Morgan Sheep Commission Company, brings this petition in equity against the United States of America and the Secretary of Agriculture of the United States (hereinafter called the "Secretary") for the purpose of suspending, enjoining, and annulling a certain purported order of said Secretary dated the 14th day of June, 1933, in a proceeding pending before said Secretary entitled "Secretary of Agriculture vs. L. B. Andrews, et al., Docket No. 311." For cause of action, petitioner alleges and shows:

I

Petitioner has its principal office and place of business in Kansas City, Missouri, in the Western Division of the Western District of Missouri, and is a citizen and resident of the State of Missouri, and a market agency registered with the Secretary of Agriculture of the United States under and pursuant to the provisions of the Packers & Stockyards Act, 1921 (42 Stat. L. 163) engaged in the business of selling or selling and buying livestock for others at the Kansas City Stock Yards located in Kansas City, Missouri, and in Kansas City, Kansas, posted by the Secretary of Agriculture as a public stock yard pursuant to the provisions of said Act.

II

The United States of America and the Secretary of Agriculture are made defendants in this action pursuant to the provisions of said Packers and Stockyards Act, 1921, the Commerce Court Act (36

Stat. L. 539) approved June 18, 1910, and the District Court Jurisdiction Act, being a part of the Urgent Deficiency Appropriations Act (38 Stat. L. 219) approved October 22, 1913, and amendments thereof. The Secretary on the 7th day of April, 1930, issued and caused to be delivered to this petitioner and the other respondents therein named a certain document described as an "Order of Inquiry and Notice of Hearing" entitled "Docket No. 311, Department of Agriculture." This Order and Notice advised this petitioner that an inquiry would be made by the Secretary under the provisions of Title III of the Packers & Stockyards Act, 1921, into the reasonableness and lawfulness of the rates and charges of this petitioner and other respondents therein named (hereinafter referred to as respondents) for stockyard services rendered at the Kansas City Stock Yards, and that a hearing would be held before an Examiner designated by the Secretary in respect thereto in Kansas City, Missouri. A hearing was subsequently held before one John C. Brooke, purporting to act under and by the authority of the Secretary, and was concluded on February 10, 1931. On the 27th day of March, 1931, oral arguments in respect to the evidence presented at the hearing were had before one R. W. Dunlap, purporting to be the "Acting Secretary of Agriculture," at Washington, D. C., and a brief was subsequently filed on behalf of this petitioner. On May 18, 1932, there was issued by the said R. W. Dunlap, purporting to be the then Secretary of Agriculture, a certain document entitled "Bureau of Animal Industry, Docket No. 311, Proceedings, Findings of Fact, Conclusion and Order." This petitioner, on account of the abnormally low prices of livestock then obtaining, on the 11th day of May, 1932, filed with the Secretary a Schedule of Rates and Charges for stockyard services rendered by it at the Kansas City Stock Yards, differing in structure and amounts of charges from the Schedule of Rates and Charges in effect at the time the aforesaid Order of Inquiry was made. Petitioner states that said Schedule of Rates and Charges so filed by the petitioner prior to the making of any of the aforesaid orders in said proceeding was not suspended by the Secretary pursuant to the provisions of the Packers and Stockyards Act, 1921, and is now in force and effect. The Schedule is set forth in Paragraph 84 of the Order. On May 26, 1932, this petitioner filed a Petition for Re-hearing and Re-investigation of the matters in said Notice of Inquiry referred to, which was granted by the Secretary on July 15, 1932. A re-hearing was had at Kansas City, Missouri, commencing on the 6th day of October, 1932, and concluding on the 16th day of November, 1932, before the said John C. Brooke, as Examiner. Thereafter, and on the 24th day of March, 1933, an oral argument upon the evidence presented at said hearing was had before one Rexford G. Tugwell, then purporting to be the Acting Secretary of Agriculture. Subsequently thereto a brief was filed on behalf of this petitioner. Thereafter, and upon the 14th day of June, 1933, there was issued by the Secretary of Agriculture a certain document entitled "Bureau

of Animal Industry, Docket No. 311, Proceedings, Findings of Fact, Conclusion and Order." (hereinafter referred to as the "Order") attached hereto, marked Exhibit "A," and made a part hereof, which said Order is by this action sought to be suspended, enjoined, set aside and annulled. Petitioner states that on the 5th day of July, 1933, there was filed with the Secretary of Agriculture by the petitioner a Petition for Re-investigation and Re-hearing, a copy of which is attached hereto, made a part hereof, and marked Exhibit "B." The Secretary denied said rehearing on July 6, 1933, and extended the effective date of the Order to July 24, 1933.

III

5 The Secretary in said Order finds and concludes that the Schedule of Rates and Charges of this petitioner now in effect contains rates and charges unjust, unreasonable, and discriminatory, and said Order prescribes lower and different rates and charges for the specific stockyard services therein described as set out in Paragraph 180 of the Order. Such Schedule of Rates and Charges so set out in said paragraph is required to be filed in tariff form with the Secretary, and no amounts in excess of the rates and charges therein provided are to be collected thereafter by this petitioner for stockyard services rendered by it on and after the 24th day of July, 1933. Petitioner states that failure to comply with the terms and conditions of said Order will subject this petitioner to heavy and severe fines and penalties as provided in said Packers and Stockyards Act, 1921, and in addition thereto, petitioner as a market agency may be subjected to numerous and vexatious suits for recovery of reparation by shippers of livestock to the market agency conducted by this petitioner at said Kansas City Stock Yards.

IV

Petitioner alleges that petitioner was denied and failed to receive, although duly demanded, a full hearing upon the matters and things set forth in said Order of Inquiry, or any of them, and that it has not been accorded the full hearing to which it is entitled under the provisions of the Packers and Stock Yards Act of 1921 and under the Fifth Amendment to the Constitution of the United States, and that by reason thereof the order of the Secretary of Agriculture made herein on June 14, 1933, is null and void as not being in compliance with said statute and would if enforced deprive petitioner of its liberty and property without due process of law; that petitioner has been deprived of the full hearing to which it is entitled as aforesaid, by reason of the following matters and things, as to each of which petitioner alleges that it constitutes in and of itself and together with any other or others thereof, a denial of the full hearing to which petitioner is entitled by virtue of said statute and the Fifth Amendment to the Constitution of the United States, and

petitioner expressly demands that the defendants make separate and explicit answer to each of the matters and things hereinafter set forth, irrespective of whether or not it be alleged in a separate lettered paragraph:

6 (a) Henry A. Wallace, the Secretary of Agriculture, who made and signed the order of June 14, 1933, herein was not personally present when any of the testimony herein was taken and did not hear any of said testimony given, nor, on information and belief, was such testimony, or any of it, read to or by him, either the testimony offered by the petitioner or by the defendants.

(b) All of the testimony taken in the administrative proceeding herein was heard by John C. Brooke, an examiner of the Department of Agriculture. The petitioner offered the testimony of sixty-six witnesses. The respondents offered the testimony of forty-four witnesses. As to the testimony of each one of these witnesses, the petitioner alleged on information and belief that the Secretary neither heard it nor read it, nor had it read to him, nor read or examined any fair or adequate abstract, analysis, or synopsis thereof.

(c) As to the testimony of each of the aforesaid witnesses, the petitioner alleges on information and belief that the Secretary did not examine or consider the same.

(d) As to the testimony of each of the aforesaid witnesses, the petitioner alleges on information and belief that the Secretary did not judicially appraise the same.

(e) In the course of the administrative hearings before Examiner Brooke, the petitioner introduced one hundred thirty exhibits and the respondents introduced three hundred eighty-six. Petitioner alleges on information and belief as to each of these exhibits that the Secretary did not read it, did not have it read to him, nor did he read any fair or adequate abstract, analysis, or synopsis thereof.

(f) As to each of said exhibits petitioner alleges on information and belief that the Secretary did not examine or consider the same.

(g) As to each of said exhibits petitioner alleges on information and belief that the Secretary did not judicially appraise the same.

(h) At the conclusion of said administrative hearings before said examiner, petitioner demanded that the Secretary personally hear oral argument on its behalf. The Secretary failed and refused to hear oral argument.

(i) On or about the 25th day of May 1933, petitioner submitted a brief on the law and facts involved in said administrative hearings with the demand that the Secretary read and consider the same. Petitioner alleges on information and belief that the Secretary failed and refused to read said brief.

(j) Petitioner further alleges on information and belief that the Secretary did not read any fair or adequate abstract, analysis, or synopsis of said brief.

(k) Petitioner alleges on information and belief that the Secretary did not examine or consider said brief.

(l) Petitioner alleges on information and belief that the Secretary did not judicially appraise the arguments contained in said brief.

(m) At the conclusion of the administrative hearings before said examiner, petitioner demanded that a tentative report upon the evidence be prepared to which it might make exceptions prior to oral argument before the Secretary thereon. Petitioner's demand was refused and no tentative report was ever prepared.

(n) On information and belief, instead of personally considering the evidence and argument presented by petitioners and judicially appraising same, the said Secretary, without warrant or authority of law, delegated to one Rexford G. Tugwell, who purported to act in the premises as and in the place and stead of the Secretary of Agriculture, the powers and authority vested by law solely in the said Secretary, which powers and authority involved the exercise of legislative and judicial discretion and the determination of the issues with respect to the justice, reasonableness, and lawfulness of the rates and charges of this petitioner. Said purported appointment of said Tugwell as Acting Secretary of Agriculture to act in the place and stead of the said Secretary was unauthorized and illegal by reason of the fact that from the time he began to act until June 14, 1933, when the order herein was made, the said Secretary of Agriculture was in Washington, D. C., at his office in the Department of Agriculture, and at no time during said period was either sick, absent, or disabled from any other cause, in the performance of the official duties of Secretary of Agriculture.

V

8. The conclusion contained in the Order as expressed in said Schedule of Rates and Charges are arbitrary, erroneous, and do not constitute a statement of just, reasonable, and non-discriminatory rates and charges, as required by said Packers and Stockyards Act, 1921, in that they are predicated upon findings of fact set forth in said Order made without evidence and contrary to all the evidence presented at the hearings, hereinbefore referred to, in the following particulars:

(a) The statement (Paragraph 113) that the respondents in 1931 "in the face of almost universal lower levels in the United States were attempting to maintain their personnel and salaries thereof at levels obtaining in the more prosperous year 1929, and that this necessarily had a depressing effect upon the net moneys available to the owners of the respondent" market agencies, as shown by audits, is contrary to the testimony submitted by accountants for both the Government and the respondents. The amount claimed as an element of total costs representative of compensation to workers was less in the year 1931 than in the year 1929 by \$403,208.88, or approximately 22% of the total compensation to workers in the year 1929. The selling and buying salaries for all respondents recognized by the Chief Accountant for the Government were less by \$231,703.51 in 1931 than

in 1929, or a reduction of approximately 30%. All of the evidence showed that the diminution in net moneys available to owners of the respondent market agencies in 1931, as compared with net moneys available to the owners of market agencies in 1929, was due to a reduction of approximately 13% in gross revenues, and by reason of the further fact that respondents were unable to reduce proportionately operating costs, such as rent, utility services, postage, taxes, and other fixed expenditures. Petitioner states that the gross revenue collected by all respondents as selling and buying charges in the year 1932 was less by 24.54% than in the year 1929, and for the first five months of the year 1933, was less by 18.96% than the revenue collected in the first five months of the year 1932. The reduction in 1933 was due to the combined effect of lower charges and the reduced volume of business handled.

(b) The Order (Paragraphs 142 and 143) holds that it is reasonable to expect a salesman of cattle and calves to sell efficiently 29,000 head of cattle a year, a salesman of hogs to sell efficiently 85,000 head of hogs a year, and a salesman of sheep to sell efficiently 250,000 head of sheep a year. The Order states that each of the salesmen is presumed, in addition to the actual transaction of the sales, to perform all of the services incidental but necessary to the selling operation customarily performed by these salesmen. These services include the maintenance of contacts with the owners of livestock prior to shipment, appraisal in the country, supervision enroute to market either while on pasture, in feed lots, or at railroad feeding stations, keeping informed as to the changing market conditions, sorting and grading the livestock at the market, consulting with owners of livestock at the market, or advising them of the result of the sales if away from the market together with such other duties as are usually performed by competent and efficient salesmen. This finding is in conflict with all of the credible and competent evidence in the record. The evidence shows that no salesman employed by any respondent during any year reached or attained such a standard of performance. The average number of head handled per salesman either in the year 1929 or 1931, or any other year, by this petitioner, or by any other of the 61 respondents mentioned in the proceeding, is shown by the evidence to have been less than the standard set forth by the Order and upon which the costs formulated by the Order are based and predicated.

The actual application of this formula in the year 1931 would have reduced the number of cattle salesmen actually employed in the sale of cattle and calves from 188 to 78.77 men. These salesmen would have been required to sell 2,284,207 head of cattle and calves, making 437,688 separate sales at the rate of 8.9 sales per man in each active selling hour. Each salesman would have realized in net proceeds to owners of cattle and calves \$2161.32 per hour instead of \$635.55 per hour. The formula as to hogs reduces the number of hog salesmen actually engaged in 1931 from 50 men to 12.3 men. These men would be required to sell 1,045,048 hogs and to make 13.48

sales per hour, each realizing an average value of \$121.94. The net proceeds of sales per actual selling hour for each salesman would be increased from \$470.34, the amount actually returned to users of the service, to \$1,913.23. The number of sheep salesmen would be reduced from 15 to 7.59 men. These salesmen would be required to sell 1,896,608 head of sheep in a year, making 9.05 sales per selling hour and actually disposing 400.47 head per selling hour. The net proceeds of sales per salesman returned per hour would be increased from \$1,080.02 to \$2,134.51.

The evidence at the hearing showed that livestock salesmen, unlike ordinary salesmen, determine the price for the commodity they sell. The formulas set and standards determined are not only contrary to all the evidence before the Secretary, but the accomplishment of the results demanded would involve the complete destruction of the efficiency of the marketing operation, cause tremendous losses to the sellers of livestock, and establish an obstruction in the current of commerce in respect to livestock at the Kansas City Stock Yards of such nature as in and of itself to constitute a violation of the provisions of the Packers and Stockyards Act, 1921.

(c) The finding of the Secretary that the sum of \$4,000.00 a year was a reasonable compensation for a cattle salesman, \$3,000.00 a year for a hog salesman, and \$3,500.00 a year for a sheep salesman, regardless of whether such salesman be an owner or an employee, and irrespective of his relative ability, experience, energy, or the time devoted to his work or services incidental thereto, is not based upon any evidence in the record, and is contrary to all of the testimony in the record, which was to the effect that the service value of such salesmen was unlike as a result of individual differences in experience, ability, personality, energy, and other characteristics, and that owner salesmen as a class were men of greater skill, ability, experience, and energy than employed salesmen. The finding is contrary to the testimony of all witnesses who gave evidence with respect to the amount of compensation to which owner-workers connected with this petitioner and other respondents were reasonably entitled for the services rendered by each of them. The Order, in finding that these witnesses were not particularly qualified to express opinions upon this subject, disregards all of the evidence in respect to the qualifications of such witnesses.

(d) The conclusion contained in said Order, to the effect that costs classified as "Business-getting and Maintaining Expenses" were unnecessary and excessive, was without evidence in support thereof and contrary to all of the evidence in the record. The costs so classified included amounts actually expended during the year 1931 by this petitioner and others of the respondents for traveling expenses incident to the appraisal of livestock before sale and supervising the feeding of livestock enroute to market at feeding stations, for advertising, for the preparation, printing, and posting of circulars and market reports sent to stockmen; for automobile maintenance and transportation in connection with the ren-

dition of the stockyard services required of petitioner under the Act, and for dues and assessments paid to the Kansas City Live Stock Exchange, a voluntary Association, to which this petitioner belongs, for the support of the varied and essential activities of said Exchange. The Order erroneously treats all expenses classified by the Government accountants as "Business-getting and Maintaining expenses" as expenditures incident to procuring new business through the entertainment of prospective customers and advertising, whereas more than 80% of the expenses so classified by the accountants were in fact expenses incurred in the actual rendition of the stockyard services this respondent is required to render under the Act. The amount of expenses so classified and recognized by the Secretary and covered into the rates established would be insufficient to pay all traveling expenses actually incurred by this petitioner, would leave nothing for the payment of dues and assessments due to the Kansas City Live Stock Exchange, for the sending out of market circulars and market information to patrons, for any form of advertising, or for the operation of automobiles, or for the entertainment of shippers. The undisputed testimony shows that during the period mentioned in the Order commission rates at Chicago and St. Louis, competitive markets, collected by market agencies at such markets were substantially higher than charges of this petitioner. Despite higher rates during said period, the percentage of livestock originating in the territory tributary to Kansas City marketed at Chicago and St. Louis increased in relative volume. Other undisputed evidence discloses the intensity of the competitive efforts of packers and others to divert livestock from the Kansas City market. The clear necessity is apparent for greater rather than reduced expenditure of time, effort, and money by this petitioner in getting and maintaining business. The effect of the Order, therefore, in eliminating expenditures for business-getting would be to increase rather than decrease unit operating costs of this petitioner.

12

VI

Petitioner states that the conclusions expressed in said Order and upon which the Schedule of Rates and Charges for stockyard services contained therein is based and predicated are arbitrary, inaccurate, and erroneous for the reason that relevant facts appearing from the undisputed evidence taken at the hearings were ignored in the Findings of Fact set forth in the Order in the following particulars:

(a) The evidence showed conclusively that the Schedule of Rates and Charges first placed under inquiry and higher in amount by more than 10% than the rates and charges found to be unjust and unreasonable by the Secretary was established after hearing and investigation by the then Secretary as a just, reasonable, and non-discriminatory Schedule of Rates and Charges under conditions much more favorable to petitioner from the standpoint of both gross and operating net income than the conditions existing in 1929 or subse-

quent thereto or which may be reasonably expected to exist during the period in which the Order may be effective. It was also shown that the rates and charges under inquiry expressed in percentage of net sales proceeds handled were less than 2% thereof and less on a sales percentage basis than the rates and charges in effect at the Kansas City Stock Yards by market agencies during the period of the greatest growth and development of the livestock market at Kansas City. Such rates were also shown to be less than the charges for commission or brokerage service for selling any other agricultural product, although livestock, due to its perishable nature and other characteristics, and variability in quality and price, involves a greater expenditure of time, effort, and professional skill on the part of the selling agencies than any other of such compared agricultural commodities. The evidence showed that the value to the user of the service of increased efficiency in the selling service amounts to many times the total of all marketing costs. During the period of the World War and from 1913 to 1919 these rates were increased by only 10%, whereas increases occurred of approximately 200% in cost of living, farm wages, general hourly wages, livestock prices, packing costs, and meat retailing costs and transportation costs, and in

13 brokerage and commission charges affecting other commodities, both agricultural and industrial. The Order in its Findings of Fact or Conclusions does not refer to or consider any of the above evidence, and is erroneous and prejudicial to petitioner in that it failed to give cognizance to the value of the services rendered in determining the amount of just and reasonable rates and charges.

(b) The Order, in Paragraph 129 thereof, states that the Packers and Stockyards Act, 1921, does not clothe the Secretary with authority to determine how many agencies would be required to handle business at the Kansas City Stock Yards properly, but fails to give consideration or weight to the undisputed testimony taken from the official records on file in the office of the Secretary of Agriculture disclosing that the Secretary since 1921 has registered as market agencies at the Kansas City Stock Yards, as competitors of this respondent, applicants for registration who have previously been expelled from membership in the Kansas City Live Stock Exchange for confessed misapplication and embezzlement of the proceeds of the sale of live stock, and has compelled, through court proceedings, the said Exchange and this respondent to extend to such registrants and to many other registrants all of the market facilities of said Exchange, including the use of the Clearing House, participation in the blanket fire insurance policy maintained by the Exchange, the hog dockage and inspection service, and other services operated by the Exchange.

(c) The Order failed also to give weight or consideration to the undisputed evidence showing that under rules and regulations of the Kansas City Live Stock Exchange this respondent and other respondents adopted all reasonable means of promoting economies of opera-

tion and reducing expenditures incident to the getting and maintenance of business. The extent, amount, and nature of these restrictions upon the solicitation of business were shown by the evidence to have been previously recognized by the Secretary through participation in a Market Practice Agreement relating to the transaction of business by market agencies not affiliated with said Exchange, including agencies organized on the co-operative plan.

(d) The Order predicates the conclusions therein reached upon a finding of fact that the demand for livestock at Kansas City, particularly for hogs, is greater than the supply of livestock at the public market. It sets forth the increasingly large number of hogs received by packers direct at their plants through private stockyard operations during the period from 1921 to August 1932, but fails to mention or give weight to other important and relevant evidence in the record. This evidence shows that such purchases of livestock as were made at private stockyards by such packers were consummated with the aid of and upon the basis of market prices determined on the date of purchase as to hogs at the Kansas City Stock Yards by and through the efforts of this and others of the respondents, and that the continuance of such private stockyard operation by said packers was dependent upon the existence of a public price-determining livestock market: This enabled these packers to acquire livestock without contributing proportionately to the cost of the maintenance of said public market. It was further shown that these packers pursued unfair competitive methods and practices in connection with acquiring receipts of livestock through said operations; and that the effect of this situation was not only to reduce the gross revenue of this respondent due to the diminution in volume of hogs and other livestock sold and bought but also to increase the variability from day to day in amount of livestock marketed.

(e) Although the Order contains a finding of fact stating that livestock tends to move from producer to consumers by the most economical route, it fails to mention or refer to the other relevant and undisputed testimony in the record showing that in the early part of the year 1932 the railroads centering at Kansas City established freight rate differentials and market privileges favoring the use of railroad stockyards in the vicinity of Kansas City, Missouri, amounting to many times the total marketing costs on livestock handled at the Kansas City Stock Yards, and that such freight rate differentials have diverted livestock from the Kansas City Stock Yards, and will in the future tend to limit and reduce the volume of livestock sold or handled by this petitioner unless such differentials are abrogated by action of the Interstate Commerce Commission now being sought through a proceeding brought by the Kansas City Live Stock Exchange.

(f) The Order failed to give weight or consideration to the undisputed evidence disclosing operating conditions at Kansas City creating higher market agency or operating costs than others of the five leading competitive markets referred to in said

Order and which were shown to have higher rates and charges in force and effect than those under inquiry or described as reasonable by said Order. The evidence showed a greater variability in the volume of receipts from day to day of livestock at Kansas City, greater diversity in grades of livestock received, delivery of trucked-in livestock to market agencies at unloading chutes instead of at pens assigned to agencies as at other markets, a greater area from which receipts are drawn, a larger proportion of stocker and feeder cattle handled, necessitating double contracts with sellers in the West and Southwestern portions of the country and buyers in the Central and Eastern portions of the United States, all of which increased the expenditure of effort and money necessary in connection with the efficient operation of the business of this petitioner and other respondents as compared with conditions existing upon other markets. The evidence showed that peak receipts by month or week in Kansas City were equal in volume as to cattle and calves to the peak receipts by month or week in Chicago, although the average volume at Kansas City was only 50% of the average volume for the year in Chicago. The Order ignored the effect of variability of volume in creating stand-by expenses and increasing unit operating costs.

VII

Petitioner states that the Order is based on erroneous conceptions of established rules of law and, therefore, the rates and charges provided therein are unlawful and void for the following reasons:

(a) The "functional unit costs" allegedly reasonable set forth in said Order in no instance have a counterpart in the actual experience of any one of the sixty-one respondents named in said proceeding. These theoretical unit costs fixed by the Order when applied to the 1931 volume of all respondents, including this petitioner, save the two co-operatively-organized market agencies, produce an aggregate supposititious handling cost; including return on investment, which is \$607,321.32 less than the aggregate costs found to exist in the actual operation of the business by the petitioner's accountant, and 16 \$422,071.95 less than the aggregate costs and expenses recognized by the Government's Chief Accountant to have been encountered by these agencies in the actual rendition of stockyard services. The costs and expenses recognized by the Government's accountant (R. Exhibit 115) include no expense incident to bad debts, refused purchases, interest paid, errors in accounting, donations to Community Chests, or reserve to meet uninsurable hazards, and no allowance for profits. After these eliminations, the costs recognized by Government accountants are as to all the respondents in the proceeding, including the two co-operatively-organized agencies, \$459,200.73 in excess of the total cost fixed as reasonable by the Order. The complete lack of comparability between the unit functional costs and the total costs expressed in the Order and shown in evidence as applied to the fifty-nine respondents except the two co-operatives, is

demonstrated and shown on the statement herewith filed, made a part hereof, and marked Exhibit "C."

The separation of so-called species costs into functional costs, as for selling, yarding, office work, administration, business-getting, etc., was wholly arbitrary and not based on any natural segregations incident to the actual performance of these functions inasmuch as the same personnel and the same facilities were used very largely to perform all of these functions by petitioner and other respondents. These arbitrary bases of apportionment varied widely from the facts and were based wholly upon the judgment of the person who accomplished the segregation. The testimony of all accountants was to the effect that while aggregate operating costs could be stated with a fair degree of accuracy, functional costs were erroneous to the extent that the arbitrary and hypothetical bases of apportionment or segregation were unsound. The cost finding process in the Order then proceeds to eliminate from these disintegrated or functional costs the portions thereof represented by salesmen's and buyers' compensation and business-getting and maintaining costs, and to substitute therefor arbitrary amounts representing but a small fraction of amounts eliminated. These disintegrated functional costs are then reintegrated on purely an arbitrary or judgment basis. The process employed served to bring about a magnification of errors inherent in the original functional cost separation. The re-

17 integration process ignored the practical situation confronting this petitioner and other market agencies in that such agencies are compelled to operate as independent units handling all species in all kinds and sizes of consignments. The selling costs are found to be unusually low in the case of agencies that have relatively high unit costs in respect to those expenses classified as business-getting and maintaining expenses. These functional costs were considered separately in the rate-making process used in the Order and, therefore, the connection between low selling costs and relatively high business-getting costs in some agencies was lost sight of and received no consideration in the formulation of total costs. Under this procedure, hypothesis rests upon hypothesis and conjecture is piled upon conjecture, to the end that the final result reached bears no resemblance whatever to the facts of the situation as shown by the evidence to exist. Neither the agencies handling average volume, nor any other agency, or class of agencies, including this petitioner, find their functional costs as set out within the range of the total unit cost denominated as reasonable by the Order. The result is an Order, as hereinafter stated, confiscatory of the property and livelihood of this petitioner, and evidences an erroneous conception and application of established rules of law and a complete disregard of all the cardinal principles of sound accounting and cost finding.

(b) The Order purports to allow, in Paragraphs 159 to 163, inclusive, reasonable costs per head to cover compensation for management. Said costs as allowed are, in fact, unjust, unreasonable, non-compensatory, and non-reimbursible of expenses in good faith in-

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curred by petitioner in that the bases stated for the calculation there-
for in Paragraph 159 is the ascertained cost of management of the
two co-operative respondent market agencies. Under all the evi-
dence, the costs sustained by such agencies are not comparable with
the necessary costs incident to the management of this petitioner's
business by reason of the fact that the amount so stated applies to
conditions and expenses of management dissimilar and noncompa-
rable with those confronting this petitioner and all others of the
respondents except said two co-operatively-organized concerns. This
evidence shows that such co-operative associations are managed by
their several Boards of Directors, no allowance for whose time
and expenditures is included in the amount set out as basic
in said Order, and receive in addition assistance from public
employees in connection with matters affecting management, includ-
ing employees of the Department of Agriculture, both in and out of
Washington, D. C., the expense of which is not included in the
amount stated or estimated by said Order. The statement contained
in Paragraph 159 of said Order, to the effect that reasonable rates
"should provide also a per head profit, that is, compensation for
management and the carrying of uninsurable risks," is based upon
an erroneous conception of law in that fair compensation for man-
agement and expenses incident to carrying uninsurable risks does
not constitute profit, but constitutes, and is, expense. The Order
in purporting to allow in the ascertainment of per head costs, for
reasonable profits or margin of profits in respect to selling or buying
each species of livestock, yet failing so to do, is inconsistent and
erroneous.

(c) The Order erroneously failed to allow as an element and part
of the capital of this petitioner and upon which a return is allowed
by said Order any amount representative of going concern value as
shown to exist by the evidence taken at the hearing. The Order holds
that a rate of return of 6% on fixed capital and 7% on working capi-
tal used by petitioner was reasonable and allows that amount only
in calculating the gross return recognized by the Order and covered
into the rates and charges established. The total return on invested
capital for fifty-nine of the respondents, except co-operatives,
amounts to \$49,164.88, whereas this petitioner and other respondents,
in accordance with their respective use and employment of capital,
were lawfully entitled to a return thereon of not less than \$59,719.21.
The Order is in conflict with the uncontradicted testimony of many
witnesses, including experienced bankers and others familiar with
financing market agency operation, to the effect that interest rates in
excess of 8% per annum were reasonable and necessary in order to
induce the investment of capital in the maintenance of the business
of market agencies under the conditions existing in 1931 at the
Kansas City Stock Yards.

(d) The Order erroneously fails to allow, as an element of
the reasonable cost of operations of this petitioner and other
respondents, expenses incident to obtaining insurance against

normal risks and hazards encountered in the business, including insurance partially indemnifying the respondents against loss by reason of the liability imposed on respondents on account of the guaranty of title undertaken by respondents upon the sale and disposition of livestock. As to the fifty-nine respondents, except co-operatives, engaged in selling operations, the Order fails to recognize costs in this category aggregating \$19,918.63 found to exist by the Government accountants and \$11,245.60 found to exist by respondents' accountant.

(e) The Order, in disallowing as elements of reasonable cost and failing to cover into the rates and charges prescribed traveling expenses, dues and assessments necessary to the support of the Kansas City Live Stock Exchange, advertising expense, losses inevitably incident to errors in accounting processes, losses incident to insurable and uninsurable hazards, moneys expended for donations to the Community Chests maintained by the Chambers of Commerce in Kansas City, Missouri, and Kansas City, Kansas, losses incident to bank failures affecting the collection of items or remission of proceeds, amounts actually expended in the employment of salesmen necessary to efficiently handle and transact the stockyard services rendered, invades the right and authority of this petitioner to manage and conduct its own business, inasmuch as all of such expenditures were actually made in good faith in the sound exercise of the best business judgment of petitioner developed as a result of practical experience of many years in the operation of a market agency at the Kansas City Stock Yards.

(f) The effect of the Schedule of Rates and Charges is to permit increases in rates to "dealers" registered under the Packers and Stockyards Act, 1921, and to permit increases in the rates and charges for buying livestock. Such rates are shown by all the evidence in the record to apply to stockyard services, the relative cost of which as compared with selling service does not justify such increases and the increases allowed are not collectible or realizable by this petitioner in the actual and practical conduct of its business. The effect of said

Order is to increase buying rates to an extent approximately
20 40% in excess of the rates and charges for similar buying services of market agencies at Chicago, and establish as reasonable rates approximately 40% less than the rates for selling services at Chicago. An increase is permitted of approximately 40% in the present rates and charges for selling services rendered for "dealers." The rates so stated representing increases are merely "paper" rates and are not predicated on any fair consideration of the record or upon any cost accounting developed by the Order or evidence. An application of such rates to business handled by petitioner under existing circumstances would be impossible without petitioner encountering greater loss than gain. In the calculations contained in this petition as to the yield of the rates prescribed, these increases are not included. In such respects the said Order represents an unwarranted, injudicious and prejudicial attempt, without

evidence, to readjust rates. The buying and dealers' rates so established are discriminatory and prejudicial, and if put in effect would create an obstruction to the flow of livestock in commerce at said stock yards in violation of the Packers and Stockyards Act, 1921.

VIII

The Schedule of Rates and Charges prescribed by the Order is confiscatory as to this petitioner and takes the property of petitioner without due process of law in violation of the Fifth Amendment of the Constitution of the United States in that:

(a) The gross revenue which would have been received by petitioner in the year 1931 if said Schedule of Rates and Charges had been in force and effect would have amounted to \$4,623.96 less than the total calculable costs incurred by petitioner in the rendition of stockyard services (R. Exhibit 207), and in that amount and to that extent the enforcement of the Order would wrongfully and unlawfully confiscate the property of this petitioner.

The confiscatory effect of the Schedule of Rates and Charges prescribed if presently applied to the business of petitioner would be further enhanced by reason of reduction in the gross revenue of petitioner due to diminution in volume of business handled. The gross yield to petitioner of the rates and charges collected was less in 1932 by 70% than the revenues received in 1931, and for 21 the first five months of 1933 less by 5% than during the first five months of 1932. As applied to business of petitioner the said Schedule of Rates and Charges would cause a further reduction in revenue in respect to cattle and calves of not less than —%, in respect to hogs of not less than —%, and in respect to sheep of not less than 13.59%.

(b) The gross yield of the rates and charges prescribed if applied in 1931 would have been less in amount than the total costs of operation of petitioner's business recognized by the Government's Chief Accountant in the Cost Study introduced in evidence (R. Exhibit 115).

The confiscatory character of the Order is further disclosed by the fact that as to twenty out of the sixty-one respondents on the basis of the Government's own costs shown in evidence, which are referred to without prejudice, an operating deficit would be incurred, exclusive of any compensation whatsoever to owners for personal services rendered and any return on capital invested. As to hogs, thirty-nine of the respondents would sustain an operating deficit on the same basis, exclusive of any compensation to owners and return on capital. After allowing the inadequate return on capital provided by the Order, twenty-four of the respondents would sustain a net operating deficit on the basis of the Government's own showing and exclusive of any compensation to owners for personal services rendered. The amount remaining to provide compensation for the per-

sonal services of the 136 owners of respondents would provide an average annual total compensation per man of \$174.50, or 48¢ per day. On the same basis the total compensation for the personal services rendered by the owners of petitioner would amount to \$542.92, whereas the reasonable value thereof as shown by the evidence was \$1,000.00, for one owner.

(c) The rates and charges ordered into effect are individually and severally confiscatory as applied separately to calves, yearling cattle, cattle, hogs, and sheep, and each and all of said rates will fail to yield to this petitioner a fair and compensatory return for the stockyard services rendered by petitioner or a return commensurate with the value of the service rendered, and will not be reimbursable to the petitioner of the actual operating expenses necessarily incurred in the rendition of such services.

22 (d) The Order bases the rates and charges formulated upon the stated assumption that the respondents doing the largest relative volume of business operated their businesses more economically and efficiently than others of the respondents doing a lesser volume of business. On page 39, said Order refers to eleven agencies as having handled more than 50% of the total market volume of livestock at the Kansas City Stock Yards in 1931. The Schedule of Rates and Charges found reasonable by said Order on the basis of costs found to exist by the Government accountants and exclusive of any compensation whatsoever for the personal services rendered by the owners of said respondents, would have lacked \$20,670.28 of meeting the inadequate allowance for return on capital investment provided for in the Order. The Order (page 23) mentions the fact that twenty-three agencies, inclusive of the eleven above referred to, handled more than 75% of the market volume as measured by equivalent carlots. The owners of these twenty-three respondents would have received under said rates on the Government's own showing (Exhibit 115) no compensation whatsoever for personal services rendered and a return on capital invested amounting to only 60% of the inadequate return allowed by the Order.

(e) The net operating loss sustained upon the basis of the Government's own cost showing by the two co-operatively-organized agencies would have been respectively \$22,782.76 and \$14,346.02.

IX

The Secretary erroneously and improperly overruled and denied the Petition for Re-investigation and Re-hearing (Exhibit B) filed herewith and made a part hereof. Petitioner states that in and by said Petition for Re-investigation and Re-hearing the Secretary was advised that economic changes affecting petitioner of radical and far-reaching character and effect had occurred since the taking of evidence at the hearings hereinbefore referred to and prior to June 14, 1933, the date of said Order, rendering the evidence so taken incomplete, inadequate and misleading as an expression of present or future con-

ditions as to revenues, costs or volume handled by this petitioner. Petitioner reasserts as grounds for the relief sought in the petition all of the allegations contained in said Petition for Re-investigation and Re-hearing, to the same effect as if fully set out in this petition.

Your petitioner states that the failure on the part of the petitioner to comply with such purported Order of the Secretary may subject petitioner to prosecution and liability for penalties in large amounts as against which liability your petitioner will have no adequate protection at law and may subject it to multifarious and vexatious suits for reparation on the part of various shippers of livestock. Should your petitioner attempt to avoid liability for penalties under duress and publish and establish the rates specified in the Order of said Secretary, petitioner will be required by law to collect such rates, which in many instances will result in reductions in the revenues of your petitioner, and if later on it should be determined that said Order of the Secretary is null and void, your petitioner would be without means of collecting the difference between said rates prescribed by said Secretary and the present rates without multifarious suits and actions at law, impractical in character, against those shippers to whom such reductions apply. Your petitioner will, therefore, unless the said purported Order is suspended, enjoined, set aside and annulled, and if pending final determination whether or not its enforcement is not temporarily stayed and suspended, suffer irreparable injury, for which it would be without adequate remedy or protection at law.

Wherefore, petitioner prays:

(1) That a writ of subpoena issue immediately out of and under the seal of this Court, and be directed to said defendants, the United States of America and the Secretary of Agriculture, requiring said defendants, on a day certain therein to be specified, to be and appear before this Court and to answer this bill, but not under oath, answer under oath being hereby expressly waived;

(2) That this Court direct that due and proper notice of this petition and proceeding issue and be served forthwith, as prescribed in said Act of October 22, 1913 (28 U. S. C. A., Secs. 41 (28) and 43 to 48, inclusive);

(3) That a court constituted as required by said Act of October 22, 1913 (28 U. S. C. A., Sec. 47) be convened and that said court so constituted and convened shall hear this petition upon due and legal notice to defendants;

(4) That upon the filing of this bill, the Judge of this Court shall call to his assistance two other Judges, one of whom shall be a Circuit Judge, and that upon three days' notice to defendants, this Court shall enter its order staying and suspending the enforcement, operation, or execution of said Order of said Secretary, and each and every part thereof, for sixty days from the date of said Order; and that after five days' notice of the time and place of hearing having been given to defendants, petitioner herein be granted a tem-

porary injunction restraining the Secretary of Agriculture and the United States from enforcement of said Order of June 14, 1933;

(5) That this Court, upon final hearing of this suit, enter a decree herein permanently suspending, enjoining, setting aside, and annulling said Order of said Secretary;

(6) That petitioner have and recover of the defendants the proper costs of this suit; and

(7) That the petitioner have such other and further general relief in the premises as may to the Court be deemed just and equitable.

JOHN B. GAGE,
Solicitor for Petitioner.

[*Duly sworn to by John B. Gage; jurat omitted in printing.*]

Exhibit A to petition

United States of America

Before the Secretary of Agriculture

PRECEDINGS, FINDINGS OF FACT, CONCLUSION, AND ORDER

Bureau of Animal Industry Docket No. 311

SECRETARY OF AGRICULTURE

vs.

25 L. B. ANDREWS, Doing Business as L. B. Andrews Livestock Commission Company; A. B. Bachman, Doing Business as A. B. Bachman Livestock Commission Company; W. N. Baucus and Ira Kimmons, a Partnership Doing Business as Baucus & Company; Charles N. Bird; Charles E. Blount, Doing Business as Charles E. Blount & Company; Frank Boddington, Doing Business as Frank Boddington Livestock Commission Company; Bowles Livestock Commission Company; Burlington Livestock Commission Company; Henry F. Carnes, Doing Business as Henry F. Carnes Livestock Commission Company; Cassidy Southwestern Commission Company; John Clay, F. H. Connor, C. A. Klemen, and J. G. Forrest, a Partnership Doing Business as John Clay & Company; Crider Brothers Commission Company; Warren Cummings, Doing Business as Warren Cummings Livestock Commission Company; W. E. Curtis Doing Business as W. E. Curtis & Company; Charles Dixon Commission Company; E. R. Corrigan and Karl N. Soeder, a Partnership Doing Business as Corrigan & Soeder; Drumm Standish Commission Company; Ehrke-Martin Livestock Commission Company; E. W. Elliott and R. K. Swain, a Partnership Doing Business as Elliott, Swain & Company; Farmers Union Livestock Commission; Farrar, Davis & Campbell Livestock Commission Company; Link Fasken, Doing Business as Link Fasken Commission Company; Gillespie & Jones Livestock Com-

mission Company; W. G. Gladish, Doing Business as Gladish Livestock Commission Company; E. W. Goodson, G. E. Goodson, and O. C. Green, a Partnership Doing Business as Goodson-Green Company; Norman B. Greer, Doing Business as Greer & Company; O. C. Haggart, John H. Wilson, and Glenn Haggart, a Partnership Doing Business as Haggart, Wilson Livestock Commission Company; W. F. Humphrey, Doing Business as W. F. Humphrey & Company; Inman-Hutton Livestock Commission Company; W. E. Burrus, Doing Business as Interstate Livestock Commission Company; J. G. Jackson; Jefferson-Lowry-Davis Commission Company; W. M. Liggett and Roy K. Sanson, a Partnership Doing Business as Kansas City Livestock Commission Company; Harry Kennaley, Doing Business as Harry Kennaley Commission Company; W. C. Kile, Doing Business as W. C. Kile Livestock Commission Company; H. H. Klecker, Doing Business as Hinie Klecker Sheep Commission Company; E. L. Knight
26 and E. Tice, a Partnership Doing Business as Knight & Tice Sheep Commission Company; Harmon C. Knighton, Doing Business as Ham Knighton Commission Company; S. Kraus; J. M. Laird, G. T. Laird, and H. E. Laird, a Partnership Doing Business as Laird Bros. Livestock Commission Company; Walter G. Land, Doing Business as Walter G. Land Livestock Commission Company; W. M. Leitch-Sheep Commission Company; L. Levy; R. H. Lewis, and S. H. Flournoy, a Partnership, Doing Business as Lewis-Flournoy Livestock Commission Company; A. E. Long and Robert B. Perry, a Partnership Doing Business as Long-Perry Livestock Commission Company; Martin Bros. & Lee Livestock Commission Company; A. J. Maurer; Grover C. Maxwell, Doing Business as Grover C. Maxwell Commission Company; H. B. Dorsett, Doing Business as M. K. & T. Commission Company; T. S. Moffett, H. M. Baker, and J. M. McLain, a Partnership Doing Business as Moffett Livestock Commission Company; Fred O. Morgan, Doing Business as Fred O. Morgan Commission Company; Jay D. McCormack, Doing Business as Jay D. McCormack Livestock Commission Company; McDonald Livestock Commission Company; Roy W. Nance, Doing Business as Roy W. Nance Livestock Commission Company; National Livestock Commission Company of Kansas City; John M. Nichols, Doing Business as John M. Nichols Livestock Commission Company; E. E. Sutton, Doing Business as O. K. Cattle Company; W. O. Park; W. H. Peed, Doing Business as W. H. Peed Livestock Commission Company; K. L. Peterson and W. F. Humphrey, a Partnership Doing Business as K. L. Peterson & Company; Bryant Poole, D. L. Dempsey, and James Rutherford, a Partnership Doing Business as Poole-Dempsey-Rutherford Livestock Commission Company; Producers Commission Association; J. M. Ragland, W. B. Storts, and W. L. Burrus, a Partnership Doing Business as Ragland, Storts & Burrus; M. W. Rice and George E. Kirk, a Partnership Doing Business as Rice & Kirk; George P. Robinson and Joe R. Hoover, a

Partnership Doing Business as Robinson-Hoover Commission Company; F. W. Banks and C. A. Rountree, a Partnership Doing Business as Rountree-Banks; Ryan-Robinson Commission Company; Fern O. Sanders, Doing Business as Fern O. Sanders

27 Livestock Commission Company; William M. Schwartz, Joseph M. Nolan, and Laurence Feaman, Jr., a Partnership Doing Business as Schwartz-Feaman-Nolan Company; E. F. Searls, Doing Business as George W. Searls & Son; The Stagner, Pieronnet & Willis Livestock Commission Company; B. C. Stanley, Doing Business as Stanley Commission Company; C. A. Stuart, Doing Business as C. A. Stuart & Company; Swift & Henry Livestock Commission Company; George S. Tamblyn, Doing Business as Tamblyn Commission Company; L. Knop, Henry F. Thies, E. J. Thies, F. W. Thies, and A. C. Thies, a Partnership Doing Business as H. Thies & Sons; Ben L. Welch, Doing Business as Welch Livestock Commission Company; Dan Wester, R. W. Wester, and Joseph Smith, a Partnership Doing Business as Wester Bros. & Smith Commission Company; J. Less White, Doing Business as Less White Livestock Commission Company; Wilson, Egan & Company; Witherspoon Livestock Commission Company; Curtis A. Wood; W. E. Woodford, Doing Business as W. E. Woodford Livestock Commission Company; Ralph W. Wright; Ralph W. Wright and Wm. N. Baucus, Partners, Doing Business as Wright and Baucus Livestock Commission Company; John Clay, F. H. Connor, Alan F. Wilson and Chas. G. Smith, Partners, Doing Business as John Clay and Company; L. E. Tice, Doing Business as Knight & Tice Sheep Commission Company; J. M. Laird and G. T. Laird, Partners, Doing Business as Laird Bros. Livestock Commission Company; Walter G. Land and John E. Maze, Partners, Doing Business as Walter G. Land Livestock Commission Company; Charles F. Vieregge and Robert H. Stover, Partners, Doing Business as W. M. Leitch Sheep Commission Company; H. E. Long, Robert B. Perry and B. W. Perry Partners, Doing Business as Long-Perry Livestock Commission Company; Martin, Blomquist & Lee Commission Company, a Corporation; Grover C. Maxwell and Ben J. Furnish, Partners, Doing Business as Maxwell & Furnish Livestock Commission Company; H. M. Baker; W. C. Bradshaw, Barney Metz and Louize McGrew Moffett, a Partnership, Doing Business as the Moffett Livestock Commission Company; J. M. Ragland, W. B. Storts, and W. L. Burrus, Partners, Doing Business as the Ragland, Storts and Burrus Livestock Commission

28 Company; Laurence Feaman and J. M. Nolan, Partners, Doing Business as Feaman and Nolan; Stuart-Robinson-Hoover Company, a Corporation; J. Less White and O. C. Seamans, a Partnership, Doing Business as the Less White & Seamans Livestock Commission Company; R. W. Wester and Joseph P. Smith, Partners, Doing Business as Wester Bros. & Smith Commission Company; Clay W. Stephenson and T. Ray Graybill, Partners,

Doing Business as Graybill and Stephenson; Great Western Order Buying Company, a Corporation; Dave Hamer, Doing Business as Dave Hamer Livestock Commission Company; and Harry Conley, W. H. Cripe and J. Ed Freed, Respondents.

Proceedings

1. This is a proceeding under Title III of the Packers and Stockyards Act, 1921, instituted by the Secretary of Agriculture according to his order of April 7, 1930. By this order of inquiry and notice of hearing the Secretary of Agriculture directed that an inquiry be made into the reasonableness and lawfulness of all rates and charges provided in the tariffs of the respondent market agencies at the Kansas City Stockyard, Kansas City, Missouri.

2. Said order of inquiry and notice alleged that the respondents were registered and doing business under the Packers and Stockyards Act, 1921, as market agencies engaged in the business of buying and/or selling livestock on a commission basis at the Kansas City Stockyard in Kansas City, Missouri, which has been found by the Secretary of Agriculture to be a "stockyard" as that term is defined in Title III of the Act and posted as such; that in accordance with the requirements of said Act respondents had theretofore filed, published, and put into effect a schedule of rates and charges for their services as market agencies as set forth in their tariffs and supplements thereto; that the interest of shippers, producers of livestock who patronize respondent agencies and the public generally require that inquiry be instituted under Title III of the Act for the purpose of determining the reasonableness and lawfulness of the rates and charges of all respondents named therein as set forth in their tariffs and supplements thereto.

29 3. Notice of such hearing was given to the respondents by serving upon them a copy of said order and notice. Pursuant to this order and notice a hearing was held at Kansas City, Missouri; before an examiner designated by the Secretary of Agriculture and said hearing began on December 3, 1930, and concluded on February 10, 1931. The respondents who were members of the Kansas City Livestock Exchange were present by counsel throughout the hearing. The following respondents were not present by counsel: The Farmers Union Livestock Commission and the Producers Commission Association, whose respective managers entered their appearance at the hearing; E. W. Goodson, G. E. Goodson, and O. C. Green, a partnership doing business as Goodson-Green Company who were succeeded by O. C. Green and Robert Coble, a partnership doing business as Goodson-Green Company; J. G. Jackson; W. O. Park; E. F. Searls doing business as Geo. W. Searls and Son; and, Curtis A. Wood. The following respondents had ceased to do business on the Kansas City market at the time the hearing commenced: A. B. Bachman, doing business as A. B. Bachman Livestock Commission Company;

Charles N. Bird; S. Kraus; L. Levy; H. B. Dorsett/doing business as M. K. and T. Commission Company; Roy W. Nance, doing business as Roy W. Nance Livestock Commission Company; E. E. Sutton, doing business as O. K. Cattle Company; F. W. Banks and C. A. Rountree, a partnership doing business as Rountree-Banks; and W. E. Woodford, doing business as W. E. Woodford Livestock Commission Company. Certain changes in the organization of the respondents had taken place as follows: Charles E. Blount, doing business as Charles E. Blount and Company, was succeeded by Charles E. Blount and Earnest E. Skaggs, doing business as Blount-Skaggs Company; John Clay, F. H. Conner, C. A. Klemen, and J. G. Forrest, a partnership doing business as John Clay and Company, succeeded by John Clay, F. H. Conner, A. F. Wilson, and C. G. Smith, a partnership doing business as John Clay and Company; W. M. Liggett and Roy K. Sanson, a partnership doing business as Kansas City Livestock Commission Company, succeeded by W. M. Liggett, doing business as the Kansas City Livestock Commission Company; E. L. Knight and Lawrence E. Tice, a partnership doing business as Knight and Tice Sheep Commission Company, succeeded by
30 Lawrence E. Tice, doing business as Knight and Tice Sheep Commission Company; J. M. Laird, G. T. Laird, and H. E. Laird, a partnership doing business as Laird Brothers Livestock Commission Company, succeeded by J. M. Laird, and G. T. Laird, a partnership doing business as Laird Brothers Livestock Commission Company; W. M. Leitch Sheep Commission Company, succeeded by Charles F. Vieregg and Robert H. Stover, a partnership doing business as the W. M. Leitch Sheep Commission Company; A. E. Long, and Robert B. Perry, a partnership doing business as Long-Perry Livestock Commission Company, succeeded by A. E. Long, Robert B. Perry, and B. A. Perry, a partnership doing business as Long-Perry Livestock Commission Company; K. L. Peterson and W. F. Humphrey, a partnership doing business as K. L. Peterson and Company, succeeded by K. L. Peterson, doing business as K. L. Peterson and Company. Counsel for respondent market agencies who are members of the Kansas City Livestock Exchange entered appearances for these firms whose organization had been changed.

4. Oral argument was had before the Acting Secretary of Agriculture on March 27, 1931, and respondents' counsel submitted a brief on behalf of the members of the Exchange.

5. On May 18, 1932, the Acting Secretary of Agriculture issued an order directing that on and after thirty (30) days from the date of the order the respondent market agencies and each of them cease and desist from demanding or collecting for any stockyard service the rate or charge shown therefor in the schedule of rates and charges then on file with the Secretary of Agriculture; that on and after said thirty days neither the respondent market agencies nor any of them should publish, demand or collect any rate or charge for the furnishing of any stockyard service in excess of the rate or charge deemed in

said order to be just, reasonable and non-discriminatory for the furnishing of such service; that at least ten days prior to the date on which said order would become effective each and every of the respondent market agencies publish, give notice of, and file with the Secretary of Agriculture, in accordance with the Packers and Stockyards Act, 1921; and the regulations of the Secretary of Agriculture thereunder, a schedule showing all rates and charges for the stockyard services furnished by such respondent at the Kansas

31 City Stockyard, Kansas City, Missouri, and all rules and regulations changing, affecting or determining such rates or charges, and that no rate or charge so shown for any such stockyard services be in excess of the rate or charge determined by said order to be just, reasonable and non-discriminatory for such service. The effective date of the order was thereafter extended to July 18, 1932.

6. On May 26, 1932, many of the respondents filed petitions alleging in detail the general economic changes which had developed in the United States since the year 1929, that being the year of the specific financial experience of respondents which the Secretary had used in the determination of the reasonableness of respondents' rates, and further alleging in detail the particular effect upon the business of such market agency of said general changes, especially with respect to the volume of business handled by each of such market agencies. Each of the petitions prayed that the order of the Acting Secretary of Agriculture, dated May 18, 1932, be withdrawn and that this proceeding be reopened for reinvestigation of the matters and things referred to in the order of inquiry and be set down for further hearing upon the subjects set forth in the aforesaid petitions.

7. On May 11, 1932, and prior to the issuance of the order of May 18, 1932, and the filing of said petitions, each and every of the petitioning market agencies filed with the Secretary, to become effective May 23, 1932, a schedule showing either expressly or by reference all rates and charges for the stockyard services furnished by such market agencies at the Kansas City Stockyard, Kansas City, Missouri, each of which schedules has for convenience been designated "Kansas City Livestock Exchange Tariff No. 3," and has been in force and effect since said 23rd day of May, 1932.

8. In view of the decision of the Supreme Court of the United States in the case of Atchison, Topeka & Santa Fe Ry. Co. v. United States, 284 U. S. 248, and of the District Court of the United States for the Western District of Missouri in the case of St. Joseph Stockyards Company v. the United States 58 Fed. (2d) 290, the Secretary was of the opinion that it was his duty under the law to reopen this

32 docket and hold a rehearing to the end that all parties in interest might be given opportunity to present such evidence of changes both general and particular as have occurred since the year 1929 and are material to the issues raised by the Order of Inquiry herein, and also to the end that all parties might have opportunity to present such other things as might be material to said

issues; and further to the end that a general inquiry might be had into the reasonableness and lawfulness of each and every rate and charge, and each and every rule and regulation affecting any rate or charge stated in said new schedules known as Kansas City Livestock Exchange Tariff No. 3 and in the new schedules filed by the Farmers Union Live Stock Commission and the Producers Commission Association, respectively, on June 10, 1932, as aforesaid, and in any and all schedules of market agencies in effect at said Kansas City Stockyard at the time of the rehearing ordered by the Secretary. Accordingly, the Secretary, by an order dated July 15, 1932, vacated the aforesaid order of May 18, 1932, and directed a rehearing for the purposes aforesaid.

9. The rehearing ordered as above stated was held at the Kansas City Athletic Club Building in Kansas City, Missouri, by adjournment from the Federal Building in said city. The hearing began on the 6th day of October and was concluded on November 16, 1932.

10. By the order of July 15, 1932, granting a rehearing herein, the following additional parties were made respondents in the cause, namely: Ralph W. Wright and Wm. N. Baucus, partners doing business as Wright and Baucus Live Stock Commission Company; John Clay, F. H. Connor, Alan F. Wilson, and Chas. G. Smith, partners, doing business as John Clay and Company; L. E. Tice, doing business as Knight & Tice Sheep Commission Company; J. M. Laird and G. T. Laird, partners, doing business as Laird Bros. Live Stock Commission Company; Walter G. Land and John E. Maze, partners, doing business as Walter G. Land Live Stock Commission Company; Charles F. Viereggs and Robert H. Stover, partners doing business as W. M. Leitch Sheep Commission Company; H. E. Long, Robert B. Perry, and B. W. Perry, partners, doing business as Long-Perry Live Stock Commission Company; Martin, Blomquist & Lee Commission Company, a corporation; Grover C. Maxwell and Ben J. Furnish, partners, doing business as Maxwell & Furnish Livestock Commission Company; H. M. Baker, W. C. Bradshaw, Barney Metz, and

33 Louize McGrew Moffett, a partnership, doing business as the Moffett Live Stock Commission Company; J. M. Ragland, W. B. Storts, and W. L. Burrus, partners, doing business as the Ragland, Storts and Burrus Live Stock Commission Company; Laurence Feaman and J. M. Nolan, partners, doing business as Feaman and Nolan; Stuart-Robinson-Hoover Company, a corporation; J. Less White and O. C. Seamans, a partnership, doing business as the Less White & Seamans Live Stock Commission Company; R. W. Wester and Joseph P. Smith, partners, doing business as Wester Bros. & Smith Commission Company; Clay W. Stephenson and T. Ray Graybill, partners, doing business as Graybill and Stephenson; Great Western Order Buying Company, a corporation; Dave Hamer, doing business as Dave Hamer Live Stock Commission Company; Harry Conley, W. H. Cripe, and J. Ed Freed.

11. At the time of the rehearing in this cause above described, the following respondents were not engaged in business at the Kansas City Stockyards; L. B. Andrews, doing business as L. B. Andrews Live Stock Commission Company; A. B. Bachman, doing business as A. B. Bachman Live Stock Commission Company; Charles N. Bird; Charles E. Blount, doing business as Charles E. Blount & Company; Gillespie & Jones Live Stock Commission Company; E. W. Goodson, G. E. Goodson, and O. C. Green, a partnership doing business as Goodson-Green Company; W. E. Burrus, doing business as Interstate Live Stock Commission Company; S. Kraus; L. Levy; H. B. Dorsett, doing business as M. K. & T. Commission Company; Roy W. Nance, doing business as Roy W. Nance Live Stock Commission Company; E. E. Sutton, doing business as O. K. Cattle Company; George P. Robinson and Joe R. Hoover, a partnership, doing business as Robinson-Hoover Commission Company; F. W. Banks and C. A. Rountree, a partnership, doing business as Rountree-Banks; E. F. Searls, doing business as George W. Searls & Son; Curtis A. Wood; W. E. Woodford, doing business as W. E. Woodford Live Stock Commission Company; and Ralph W. Wright.

12. By reason of changes in their organization, the following respondents had at the time of the rehearing herein ceased to engage in business at the Kansas City Stock Yards, under the firm name and style under which they were named as parties respondent in this proceeding; W. N. Baucus and Ira Kimmons, a partnership doing business as Baucus and Company; John Clay, F. H. Connor, C. A. Klemen, and J. G. Forrest, a partnership doing business as John Clay & Company; E. L. Knight and E. Tice, a partnership doing business as Knight & Tice Sheep Commission Company; J. M. Laird, G. T. Laird, and H. E. Laird, a partnership doing business as Laird Bros. Live Stock Commission Company; Walter G. Land, doing business as Walter G. Land Live Stock Commission Company; W. M. Leitch Sheep Commission Company; A. E. Long and Robert B. Perry, a partnership doing business as Long-Perry Live Stock Commission Company; Martin Bros. & Lee Live Stock Commission Company; Grover C. Maxwell, doing business as the Grover C. Maxwell Commission Company; T. S. Moffett, H. M. Baker, and J. M. McLain, a partnership doing business as Moffett Live Stock Commission Company; J. M. Ragland, W. B. Storts, and W. L. Burrus, a partnership doing business as Ragland, Storts and Burrus; William M. Schwartz, Joseph M. Nolan, and Laurence Feaman, Jr., a partnership doing business as Schwartz-Feaman-Nolan Company; C. A. Stuart, doing business as C. A. Stuart & Company; J. Less White, doing business as Less White Live Stock Commission Company; and Dan Wester, R. W. Wester, and Joseph Smith, a partnership doing business as Wester Bros. & Smith Commission Company. Frank Boddington, doing business as the Boddington Live Stock Commission Company, a respondent in this proceeding, died on October 14, 1932.

13. It appears of record that at the rehearing described in paragraph 9 hereof all respondents were present by counsel except Farmers' Union Livestock Commission; J. G. Jackson; McDonald Live Stock Commission Company; W. O. Park; K. L. Peterson, doing business as K. L. Peterson Order Buying Company; Producers' Commission Association; M. W. Rice and George E. Kirk, a partnership doing business as Rice & Kirk; Harry Conley; W. H. Cripe; and J. Ed Freed.

14. It also appears of record that Farmers' Union Live Stock Commission; McDonald Live Stock Commission Company; K. L. Peterson, doing business as K. L. Peterson & Company; Producers'

35 Commission Association; Harry Conley; and W. H. Cripe were duly served with a copy of the aforesaid order granting a rehearing in this cause. It does not appear of record that either J. G. Jackson; W. O. Parke; M. W. Rice and George E. Kirk, a partnership doing business as Rice and Kirk; J. Ed Freed, or any of them, were either present at the rehearing in person or by counsel or were served with a copy of the order granting rehearing herein. However, it does appear that John B. Gage, Esq., Attorney-at-law of Kansas City, Missouri, who appeared for most of the respondents, both at the original and the rehearing, announced at the original hearing that he represented M. W. Rice and George E. Kirk, a partnership doing business as Rice and Kirk, and there is nothing in the record of the rehearing to negative the continuance of such representation except that said record fails to show the inclusion of these respondents in the list of those stated by Mr. Gage as being represented by him.

15. Oral argument on the basis of the record made at the original hearing and at the rehearing was had before the Acting Secretary of Agriculture on March 24, 1933. Respondents' counsel was given until April 15, 1933, to file a brief, and so filed it.

Findings of Fact

Upon careful consideration of the entire record in this proceeding, the following findings of fact and conclusions are made:

I. The Kansas City Livestock Market

16. The Kansas City Stock Yards Company maintains and operates a stockyard at Kansas City, Mo., at which a public market is conducted. This market was established in 1871 and has grown in importance as the production of livestock has expanded and improved in the territory tributary to Kansas City until it has become one of the leading livestock markets in the United States. A stockyard is a place where producers and others ship their livestock by rail, or by truck, or drive them in on foot, to be offered for sale to the various

classes of buyers who resort there to buy the grades and classes of livestock to meet their requirements.

17. The geographical location of the Kansas City market makes it a gateway through which much of the livestock produced in the West and Southwest passes on its way to the feed lots in the Central West and the consuming centers in the East. Considerable numbers of hogs and sheep are sold at the Kansas City Market, but its primary eminence is as a cattle market. It is the largest stocker and feeder cattle market in the world.

II. Origin of Receipts of Livestock

18. The points of origin of receipts of cattle at the Kansas City market lie principally in the States of Kansas, Nebraska, Colorado, Arizona, New Mexico, Texas, Oklahoma, Arkansas, Missouri, and Idaho. The territory in which the drawing power of the Kansas City market is distinctly greater than that of its principal competing central markets is made up of the State of Kansas, the most southerly tier of counties in Nebraska, the counties of southeastern Colorado, those of the eastern half of New Mexico, those of the northern portion of Texas, the State of Oklahoma, the counties of western Arkansas, and those of the most westerly portions of Missouri. The hogs arriving at the Kansas City market originate in a more restricted area than do the cattle and sheep. The hog territory may be defined generally as the State of Kansas, south central Nebraska, northern Texas, eastern Oklahoma, western Arkansas, and the counties located in the western third of Missouri. The sheep arriving at the Kansas City market originate in a wide area, embracing the States of Kansas, Colorado, New Mexico, Arizona, Texas, Oklahoma, Missouri, and to some extent the far western and northwestern States.

19. Ordinarily, livestock tends to move from the producer to the consumer by that route which is most economical. The trade territory of a market is determined largely by those factors which make it the most economical center to, through, and from which to move the livestock. One of the chief factors delimiting the trade territory of a market is the rate structure of the railroad transportation system which serves it. Generally speaking there is a normal trade territory for a livestock market, and this is true of the Kansas City market. Within this trade territory the Kansas City market comes into competition to a varying extent with other markets for the livestock in the counties and states from which it receives its livestock.

20. The following table gives, by species, the total number of livestock marketed from the seven states of Kansas, Texas, Oklahoma, Missouri, Nebraska, Colorado, and New Mexico at Kansas City and four of its principal competing central markets, and the percentage of the total marketed at each:

CATTLE

Year	No. marketed at 5 markets	Percent marketed at Kansas City	Percent marketed at Chicago	Percent marketed at Nat. Stkyds.	Percent marketed at Omaha	Percent marketed at St. Joseph
1920	4,864,862	49.5	3.0	14.5	21.4	11.6
1921	4,889,076	49.9	4.3	14.8	20.6	10.4
1922	5,803,333	50.4	3.7	13.9	21.4	10.6
1923	6,170,478	51.2	3.9	14.3	19.9	10.7
1924	6,262,311	48.4	5.0	14.3	21.3	11.0
1925	5,954,228	49.1	4.5	14.5	20.3	11.6
1926	5,778,123	44.7	5.2	16.5	22.6	11.0
1927	4,990,556	46.6	4.8	18.6	19.8	10.2
1928	4,841,510	44.9	5.7	15.5	22.3	11.6
1929	4,834,490	44.4	5.7	15.8	22.6	11.5
1930	4,888,804	44.0	4.9	16.3	23.9	10.9
1931	4,774,019	40.7	6.7	16.8	25.7	10.1

HOGS

Year	No. marketed at 5 markets	Percent marketed at Kansas City	Percent marketed at Chicago	Percent marketed at Nat. Stkyds.	Percent marketed at Omaha	Percent marketed at St. Joseph
1920	7,030,618	32.1	0.8	18.9	27.4	22.8
1921	7,253,311	28.6	1.0	22.3	27.9	20.2
1922	8,413,567	28.8	1.6	23.0	26.3	20.3
1923	10,843,476	30.3	1.2	24.0	26.0	18.5
1924	10,400,432	26.3	0.9	24.0	29.9	18.9
1925	7,868,149	24.6	0.9	24.1	32.2	18.2
1926	6,980,344	27.6	0.7	25.8	28.2	17.7
1927	5,897,608	26.4	1.8	32.5	25.1	14.2
1928	8,362,044	28.1	1.1	24.8	27.6	18.4
1929	8,726,306	27.8	1.1	26.3	28.0	16.8
1930	7,995,230	24.9	0.8	25.6	32.1	16.6
1931	6,652,778	19.4	0.8	23.1	39.0	17.7

SHEEP

Year	No. marketed at 5 markets	Percent marketed at Kansas City	Percent marketed at Chicago	Percent marketed at Nat. Stkyds.	Percent marketed at Omaha	Percent marketed at St. Joseph
1920	3,060,016	47.9	14.7	12.3	7.6	17.5
1921	3,718,856	42.3	22.1	12.2	7.1	16.3
1922	3,327,947	43.6	20.7	13.4	6.7	15.6
1923	3,743,367	38.7	21.8	10.3	11.1	18.1
1924	3,454,973	41.5	17.6	9.6	9.2	22.1
1925	3,355,277	40.0	15.3	10.4	11.2	23.1
1926	3,676,427	43.2	14.3	11.2	9.6	21.7
1927	3,068,669	43.0	16.6	11.1	8.1	21.2
1928	3,736,678	42.6	10.2	8.2	10.8	28.2
1929	3,729,764	42.7	8.2	9.2	11.0	28.9
1930	4,301,577	42.8	11.2	8.7	12.6	24.7
1931	4,540,010	45.8	11.8	10.1	9.6	22.7

21. The use of county lines defines trade territory more nearly precisely than does the use of state lines. The record shows for the year 1927 the counties of origin classified on the basis of the comparative drawing power of ten important markets; namely, Kansas

City, Omaha, St. Joseph, Sioux City, St. Paul, Denver, 38 Wichita, National Stockyards, Chicago, and Sioux Falls.

Those counties which sent to the Kansas City public market a number of head of livestock representing from 75 to 100 per cent of the total rail shipments to all these ten markets were placed in one classification, and those counties which sent from 50 to 75 per cent to Kansas City in another. Other groupings were made of those counties in which the drawing power of Kansas City as compared with that of other markets was less pronounced. The results of this study of the rail receipts for the year 1927 are given in the following table:

	Total rail arrivals at the Kansas City public market from counties designated by percentage of Kansas City drawing power	The total rail arrivals at ten competitive markets, including Kansas City from these designated counties	The ratio of Kansas City rail arrivals from designated counties to total rail arrivals at the Kansas City public market (expressed as a percentage of the latter)
Cattle and calves:			
75% to 100% counties.....	1,265,656	1,425,234	53.6%
50% to 75% ".....	649,677	1,055,786	27.5%
Two combined (77% area).....	1,915,333	2,481,020	81.1%
Other counties (22.5% area).....	435,042		18.4%
Total receipts.....	2,350,375		99.5%
Hogs:			
75% to 100% counties.....	578,091	641,599	36.2%
50% to 75% ".....	444,568	720,847	27.8%
Two combined (75% area).....	1,022,659	1,362,446	64%
Other counties (25% area).....	542,695		34%
Total receipts.....	1,565,354		98%
Sheep:			
75% to 100% counties.....	433,767	469,819	29.3%
50% to 75% ".....	466,365	739,901	31.5%
Two combined (74% area).....	900,132	1,209,720	60.8%
Other counties (22.5% area).....	528,204		35.7%
Total receipts.....	1,428,336		96.5%

22. Within the trade territory made up of those counties which sent to the Kansas City stockyard from 50% to 100% of the live-stock marketed by rail at the ten important markets, producers do not always send their livestock through the central markets. They may ship directly to packers located at Kansas City, packers whose plants are not located at any central market, and to those located at points farther east. The record does not disclose the extent of sales at the so-called concentration points. It does show the direct purchases of the packers located in greater Kansas City from 1920 to 1931, inclusive, and for the first eight months of 1932. It shows also for 1931 the purchases by packers located away from Kansas City but in the 50% to 100% counties of the state immediately tributary to Kansas City. These purchases were as follows:

	Total	From public stockyards	Direct from country
Cattle.....	111,767	23,531	88,236
Calves.....	53,852	6,031	47,821
Hogs.....	1,934,394	71,160	1,863,234
Sheep.....	40,134	2,051	38,083

III. Manner of Arrival of Livestock at Market

23. Presently practically all livestock handled by respondents arrived at the Kansas City stockyard either in railroad cars or motor trucks.

24. Until comparatively recently arrivals of livestock were practically exclusively by rail. Formerly it was the custom of one owner to load one species in one or more railroad cars and consign such livestock to a market agency for sale. Under these conditions of transportation and ownership the consignment came to be thought of in terms of the straight car with single ownership and the rates were assessed in terms of cars. In those days multiple car consignments containing livestock of one species and ownership were much more common than at present, such consignments in train loads of 15 or more cars not being infrequent. With the more intensive settlement of the livestock producing territory tributary to Kansas City, with changes in transportation and marketing conditions, the custom arose not only of shipping consignments consisting of fewer cars but also of mixing species within a car and shipping in the same car livestock belonging to different owners. This brought about in the tariffs or schedules of charges rates per head of livestock to be applied to less than a carload of one species.

25. Not all of the cars used by the 13 railroads serving the Kansas City market are of the same length or same weight capacity.

40 Some of the roads use 36-foot cars, others 40-foot cars. The custom has grown up on the part of those railroads using mainly 36-foot cars of furnishing two such cars when a 40-foot car is ordered by a shipper, and billing the two cars as one. The respondent market agencies assess their charges according to the billing. Some of the roads, in order to meet truck competition, have reduced the minimum weight allowable and have reduced their carload rates accordingly.

26. With the development of the motor truck and the construction of hard surfaced and other improved roads leading from the producing areas to Kansas City, there came another change in the manner of arrival of livestock at the market, namely, the gradual decrease in the percentage thereof arriving by rail and a corresponding increase in that coming in by truck. The record shows these percentages for each year from 1922 to 1931. It will be observed from the following table that in 1922 only .95 per cent of cattle, 5.58 per cent of calves, 5.49 per cent of hogs, and 7.11 per cent of sheep arrived by truck, while in 1931 the corresponding percentages were cattle 11.15 per cent, calves 35.16 per cent, hogs 51.55 per cent, and sheep 13.39 per cent.

Year	Cattle		Calves	
	Rail per- cent of total	Truck per- cent of total	Rail per- cent of total	Truck per- cent of total
1931.....	88.85	11.15	64.84	35.16
1930.....	92.19	7.81	72.99	27.01
1929.....	94.59	5.41	78.21	21.79
1928.....	96.52	3.39	82.40	17.60
1927.....	97.64	2.36	81.88	18.12
1926.....	98.16	1.84	86.34	13.66
1925.....	98.56	1.44	90.34	9.66
1924.....	98.93	1.07	92.84	7.16
1923.....	99.09	.91	93.65	6.35
1922.....	99.05	.95	94.42	5.58
Year	Hogs		Sheep	
	Rail per- cent of total	Truck per- cent of total	Rail per- cent of total	Truck per- cent of total
1931.....	48.45	51.55	86.61	13.39
1930.....	60.78	39.22	88.83	11.17
1929.....	71.37	28.63	89.71	10.29
1928.....	78.00	22.00	91.99	8.01
1927.....	83.02	16.08	91.74	8.26
1926.....	88.45	11.55	93.75	6.25
1925.....	91.12	8.88	94.46	5.54
1924.....	93.28	6.72	94.74	5.26
1923.....	95.42	4.58	94.13	5.87
1922.....	94.51	5.49	92.89	7.11

41 The above stated percentages are calculated from the total receipts of livestock by rail and by truck, respectively, as compiled by the Kansas City Stock Yards Company. Those totals contain livestock such as that stopped at Kansas City for feed, water, and rest, and that shipped direct to packers through the Kansas City stockyard, neither of which classes is handled by any of the respondents. The record shows the arrivals by rail and by truck, respectively, of the livestock handled by respondents for only the years 1929 and 1931. The following table shows the percentages arriving by rail and by truck, respectively, of the total fresh revenue producing receipts of livestock handled by respondents. By "total fresh revenue producing receipts" is meant the total livestock on which respondents received commissions, exclusive of livestock bought, livestock handled for dealers, and livestock handled for other market agencies.

Year	Cattle		Calves	
	Rail per- cent of total	Truck per- cent of total	Rail per- cent of total	Truck per- cent of total
1929.....	94.21	5.79	74.71	25.29
1931.....	88.43	11.57	58.21	41.79
Year	Hogs		Sheep	
	Rail per- cent of total	Truck per- cent of total	Rail per- cent of total	Truck per- cent of total
1929.....	67.25	32.75	90.77	9.23
1931.....	38.49	61.51	86.60	13.40

27. Comparison of the above percentages for the years 1929 and 1931 with those contained in the next preceding table indicates that a greater proportion of the livestock handled by respondents arrives by motor truck than is true of the total livestock which passes through the stockyard. Respondents' tariffs have contained for many years per head rates for selling livestock trucked or driven-in to the stockyard. Quite uniformly these rates have exceeded those charged per head for livestock arriving by other modes of transportation.

28. Not only changing modes of arrival but other factors, such as market demand and the customs of buyers, have caused the number of animals per consignment and per draft to decrease. In other words, increasingly respondents' business has taken on more of the aspects of the retail handling of a commodity. These changes have brought with them increasing costs per head of livestock handled, but such costs are included in those hereinafter stated in detail.

42 29. The foregoing developments caused the great majority of the respondents to reach the conclusion that tariff structures, which had had their inception in the days of the exclusive carload business and which, in spite of some modifications, were still based on the carload as the unit, had ceased to fit the business which respondents were doing. Accordingly, between the time of the first and the last hearing in this proceeding, those respondents filed their Tariff No. 3 which, to a considerable extent, discards the carload as the unit of charge and bases its rates on the head of livestock of each particular species regardless of the mode by which such livestock arrived at the pens of the respective respondents.

IV. The Facilities of the Market Place

30. The Kansas City Stock Yards is located in Missouri and Kansas, in that part of the central industrial district of Kansas City known as the "West Bottoms." The yard is divided into three sections. The west yard lies on the west side of Kansas River and was formerly used as a quarantine yard. The main yard lies on the east side of the Kansas River and includes the cattle, hog, sheep, and horse and mule divisions, in addition to the exchange and show buildings. The north yard lies north of the main yard and is connected with it by an underpass beneath the Union Pacific and Missouri Pacific railroad tracks. With rare exceptions, the buying and selling of livestock are carried on in the main yard.

31. The Kansas City market is served by 13 trunk line railroads and by the Kansas City Connecting Railroad, which owns rights-of-way, tracks, and loading and unloading docks and chutes, thus affording adequate transportation facilities in connection with the loading and unloading, receiving and delivering of livestock at the stockyard. It is the terminal carrier which forms the connection between the stockyard and all railroads entering Kansas City.

32. The main yard is generally triangular in shape, the base of the triangle being at the north end of the yard. There are five railroad docks on the west side of the main yard, extending in a north and south direction. Three of these docks lie between the river and the hog house, and two lie between the hog house and the cattle division. These five docks have approximately 500 unloading chutes.

43 33. The hog house is a three-story structure, rectangular in shape, extending in a north and south direction between the two sets of railroad docks. The respondent commission firms use the pens on the second floor of the hog house for selling hogs. The ground floor is used for holding cattle which are not delivered to the respondent firms immediately upon arrival, and for holding livestock which is to be shipped out of the yard. Those respondents who are engaged solely in the business of buying hogs on order use a part of the third floor of the hog house for sorting and preparing livestock for shipment. The remainder of the third floor is used for holding livestock to be delivered to packers, and a part of the roof of the hog house is covered with pens and used for the same purpose. The unloading docks and receiving pens for hogs arriving by truck are located in the north yard. Hogs unloaded there must be driven through the underpass which connects with the main yard at the north end of the hog house.

34. The cattle division lies between railroad dock No. 5 and the public thoroughfare which bounds the yard on the east. This division is not under roof and is on the ground floor. However, the scales are on viaducts, with the exception of two cattle scales which are on the surface in the traders' division. The pens and alleys in the north and, to some extent, the west part of this division are used by traders who buy and sell the different classes of cattle and calves. The commission division of the cattle yard is rectangular in shape, extending in a north and south direction, adjoining part of dock No. 5 and part of the traders' division on the west. The respondent firms have pens assigned to them in this division, in which cattle and calves are exposed for sale. There are unloading docks and receiving pens at the north end of the main yard where cattle and calves are received from trucks and later driven to the commission division.

35. The sheep barns are located in the southern part of the main yard. There are three of these barns, each being a one-story structure. The unloading docks for drive-in sheep, and the sheep dipping vat are located in this division.

44 36. The plant and pens used in connection with the immunization of hogs are situated in the southwest corner of the cattle division. The dipping vat and branding chutes for cattle and calves are located in the north yard. There is also a stock hog division in the north yard where stock hogs may be handled without

the necessity of dipping and immunizing, if they are not brought into the main yard. This division is for the purpose of encouraging the movement of stocker and feeder hogs through the public market. If such hogs are taken to the main yard to be sold or weighed, they must be dipped and immunized in accordance with State and Federal regulations.

37. The Kansas City Stock Yards Co. owns an office building, commonly called the Exchange Building, which is located midway on the east side of the cattle commission division. In addition to housing its own offices in this building, the company leases office space to respondents and others having business at the market. Opposite the Exchange Building and on the west side of this division is the train office building where the records of incoming and outgoing shipments are made. It is a sort of clearing house for the detailed information relative to the movement of livestock to and from the market.

38. Livestock arriving at the Kansas City market by rail is unloaded by employees of the stockyard company, which acts as agent for the carriers, who pay the company for this service. The loading and unloading facilities of the Kansas City Connecting Railroad are connected with an extensive system of viaducts, alleys, stock drives, subways, and bridges, which afford adequate facilities for receiving and distributing livestock to all parts of the stockyard.

39. In each division of the yard adequate scale facilities are provided by the stockyard company. There are three scales in the sheep division, one of which is designed for weighing truck consignments. There are 14 scales in the cattle commission division. These scales, the sorting and catch pens, and alleys used in connection therewith, are elevated above the pens and alleys on the ground level. They are reached by inclines and viaducts. These scales are arranged in pairs, one scale in each pair being called the "high line" scale and used for weighing drafts of 10 head or more, and the other the "jack pot" scale and used for weighing small drafts. At the west side of the

45 cattle yard there is a small scale maintained for the purpose of weighing crippled hogs. There are five scales maintained in the hog commission division on the second floor of the hog house.

40. Upon the arrival of livestock by rail at the stockyard a waybill, representing each carload, is delivered by an employee of the railroad company to employees of the stockyard company. Information as to the dock number, the time at which the train is set, names of consignor and consignee, the state of origin, car number, and class of livestock in the consignment is taken from the waybill and placed on the bulletin board by the stockyard company. These bulletins are hung in the lobby of the train office building, where they are consulted from time to time by representatives of the respondent firms for the purposes of ascertaining what livestock may have ar

rived consigned to them. After livestock is unloaded at the yard, the dock foreman, a stockyard employee, places a copy of the record of each car in a designated place in the chute alley, and representatives of commission firms consult these records to determine the location of livestock consigned to their respective firms.

41. Cattle and hogs arriving by rail are delivered to the respondent firms by the stockyard company at the unloading chutes. If their representatives are not at the unloading chutes to take delivery before the chute pens are needed for unloading, other livestock, the stockyard company yards the livestock in convenient pens near by. Under such circumstances the hogs are usually taken to the pens on the second floor of the hog house, and cattle are yarded in pens on the ground floor of the hog house. The representatives of the respondents then call for the livestock at these divisions. Sheep arriving by rail are delivered to the respondents' pens in the sheep barns by the stockyard company. In the case of cattle and hogs arriving by truck, the respondents are required to drive the livestock to their own pens from the truck unloading chutes or near-by pens. Sheep arriving by truck are unloaded at a convenient place in the sheep division and are driven to the sale pens by the stockyard company.

42. The stockyard company tags all animals arriving crippled or dead, in order that they may be properly identified. There is an arrangement whereby a rendering company gathers up the
46 dead animals and removes them to its plant, remittance therefor being made to the commission firms by the rendering company. Crippled hogs are gathered up by the stockyard company and delivered to a "crip" scale, where they are weighed and are then removed by the packers who purchase them. There are two associations which engage in the business of handling crippled cattle and sheep from the yards direct to the packing plants. Such crippled livestock is purchased on a salvage basis, and remittance is made to the commission firms to which the livestock is consigned. These associations make a special charge for this hauling service. This charge is deducted from the proceeds of the sale of the animals.

43. The stockyard company furnishes all the feed fed in the yards. It delivers the feed to the commission men's pens and feeds the livestock. Water and facilities for watering in each pen are also provided by the stockyard company. Employees of the respondent commission firms turn the water on. It frequently happens that the stockyard company will turn the water off. The stockyard company cleans the pens and maintains tractors, trailers, and other necessary facilities for removing debris. In seasons of bad weather, or on other occasions, the respondent firms may clean their own pens. Such cleaning consists in throwing the manure to one side of the pen or under the troughs. The employees of the stockyard company remove it later.

44. The stockyard company maintains weighmasters who operate the various scales and issue scale tickets containing information relative to each draft weighed. It also provides a man who assists in putting the livestock on the scales to be weighed, and a suitable force of employees to receive and yard the livestock when it is driven off the scales.

45. For its services and use of its facilities heretofore described the stockyard company makes a yardage charge on a per head basis and a separate charge for feeding. Respondent deduct these charges from the gross proceeds of sale of the livestock and pay them to the stockyard company. Separate charges are made by the stockyard company for services and use of facilities in connection with the branding, dipping, testing, immunization, or other special
47 services. Usually these special services are required in connection with the movement of livestock from the market back to the country, and the charges therefor are paid by the purchasers. If for any reason any of these services should be required by the shipper of livestock to market, the charges would be deducted from the proceeds of the sale of his livestock.

46. After livestock has been sold and weighed, it is yarded and held in pens by the stockyard company for delivery to the purchaser, or until it can be loaded, if it is to be shipped to points outside the market. If the livestock is to be shipped, the employees of the stockyard company load it on the cars. This service is rendered by the stockyard company as agent for the carrier, and a separate charge is paid by the carrier.

47. The Kansas City Stock Yards Co. endeavors through advertising and soliciting to induce shippers to consign their livestock to market for sale, and to attract buyers for such livestock. It maintains a force of employees in the country who make contacts with producers and growers of livestock. These men have knowledge of market conditions and the various grades and classes of livestock. The stockyard company maintains an information bureau which keeps in touch with the field representatives and gives them current market information. They assist farmers and producers in sorting and grading their livestock, disseminate useful market information, and endeavor to obtain shippers for the Kansas City market. They do not attempt to influence the shipment of livestock to any particular commission firm.

48. A branch of the United States Department of Agriculture maintains an office at the stockyard, which is a service organization having for its purpose the collection and dissemination of market information. This office maintains a bulletin board in the Exchange Building on which it posts information in regard to the estimated receipts at Kansas City, and other leading livestock markets of the country, the prices and trend of prices at the various markets, and

the prices of dressed meats in Philadelphia, Boston and New York. Facts as to local market conditions are obtained by employees of that office, who are regularly assigned to different divisions of the yard for the purpose of making contacts with salesmen and buyers.

48 A system of leased wires is maintained whereby similar facts are readily obtained from other markets. In addition to posting information from time to time on the bulletin board throughout the day, this office disseminates it by radio at three different periods, furnishes it to the telegraph companies and to the press associations, and publishes a mimeographed report, which circulates extensively among producers and others in Kansas, Missouri and, to a certain extent, in other states. The informational service of this office is available to all who request it.

V. Disposition of Livestock Receipts

49. Livestock received at the Kansas City market falls into two general classes: (1) stockers and feeders, and (2) killers or butcher livestock. The demand for the stockers and feeders comes principally from those producers who are equipped to feed and finish livestock either in feed lots or on pasture lands. The livestock ready for slaughter is purchased by local packers and butchers and by packers located at distant points. The chief outlet for this class of livestock is the local packer demand. Contiguous to the market are located the plants of the four large packers, Swift, Cudahy, Wilson, and Armour. There are also small packers and local butchers who cater principally to the local demand for dressed meats and meat products. The outside packers usually make their purchases through order buyers, who are regularly engaged in that business at the market. Local packers and butchers are customarily represented on the market by salaried employees. Feeders and finishers generally purchase livestock through commission firms, although they sometimes make their own purchases. There are also dealers at the market who buy for the purpose of reselling at a profit, either on the Kansas City or some other market, without slaughtering, and also without feeding such livestock to any great extent. Although dealers operate to some extent in connection with the handling of all classes of livestock, their principal activity at the Kansas City market is in buying and selling stocker and feeder cattle. Their function is primarily that of buying unsorted lots and small lots of cattle, which they later sort into different grades and classes to meet the requirements of the feeders and finishers. The disposition of the livestock received at the Kansas City market each year from 1920 to 1931, inclusive, was as follows:

CATTLE AND CALVES

	Local slaughter	Stocker and feeder shipments	Other shipments
1931.....	850,553	653,457	440,330
1930.....	1,006,989	712,064	426,012
1929.....	1,048,709	729,480	378,908
1928.....	1,029,383	779,707	375,680
1927.....	1,335,552	755,867	356,610
1926.....	1,459,204	761,119	378,231
1925.....	1,631,053	907,686	351,764
1924.....	1,552,429	997,601	442,221
1923.....	1,559,364	1,161,540	437,806
1922.....	1,406,843	1,151,256	383,208
1921.....	1,199,893	787,904	456,454
1920.....	1,263,882	778,214	431,290

HOGS

1931.....	836,653	54,852	443,994
1930.....	1,090,134	74,915	841,036
1929.....	1,454,334	104,097	907,374
1928.....	1,706,286	104,841	570,085
1927.....	1,385,208	98,310	411,963
1926.....	1,427,208	110,087	482,513
1925.....	1,236,506	66,528	764,856
1924.....	1,871,991	134,287	930,753
1923.....	2,721,412	282,900	606,340
1922.....	2,052,229	161,753	426,313
1921.....	1,712,834	93,505	392,910
1920.....	1,838,080	200,196	401,618

SHEEP

1931.....	1,433,778	257,774	563,279
1930.....	1,518,225	252,418	248,548
1929.....	1,290,177	261,722	196,120
1928.....	1,270,207	350,675	156,789
1927.....	1,124,604	353,591	137,927
1926.....	1,202,043	358,983	205,433
1925.....	1,045,517	318,655	140,256
1924.....	1,046,447	367,648	150,377
1923.....	1,100,978	406,930	147,139
1922.....	1,000,200	385,282	172,756
1921.....	1,307,428	324,150	160,512
1920.....	1,065,832	474,409	148,603

The above table does not include direct shipments to packers except in those cases in which such shipments pass through the Kansas City stockyard. The direct shipments contained in the local slaughter of hogs shown above was for the same period as follows:

1931.....	180,000
1930.....	159,000
1929.....	373,171
1928.....	323,787
1927.....	226,831
1926.....	161,500
1925.....	182,458
1924.....	206,470
1923.....	382,709
1922.....	187,360
1921.....	153,461
1920.....	31,859

50. The demand for livestock in Kansas City, and especially that for hogs, is greater than that supplied by the livestock arriving at the public market. Large numbers of hogs destined for local slaughter in Kansas City do not pass through the stockyard. In

addition to the hogs received through the stockyards the packers received at their plants located at Kansas City 1,679,138 in 1929, 1,185,258 in 1930, 1,478,960 in 1931, and 1,319,519 from January to August, inclusive, 1932.

VI. Business in Which respondents are Engaged

51. In the early development of the West, drovers were accustomed to bring their livestock to a convenient point at the junction of the Kansas and the Missouri rivers and there sell it. With the development of trading in livestock at this central point there grew up a more firmly established and permanent market place. Some of those who resorted there sold not only the livestock which belonged to them but undertook the selling of that belonging to others. Later, resident selling agencies were developed which devoted their attention exclusively to the handling of livestock for others at the central market. While it is the privilege of the owner or shipper of livestock to the Kansas City public market to sell his own livestock, the complicated machinery of the market place, which the selling agencies and the stockyard company have worked out for their own convenience, make it a practical necessity for the producer to consign his livestock to some regular selling agency for sale. A like situation prevails with respect to many who seek to buy livestock on the market. They may neither be able to come to the market in person nor find it to their advantage to maintain employed buyers. A demand has developed, therefore, for the services of those who stand ready to act as representatives of the buyers on the market. There have

51 come into existence two somewhat distinct classes of operators. The first consists of what is commonly known as commission firms. They hold themselves out to the public both to sell and to buy livestock on a commission basis. Generally speaking, the buying operations of commission firms constitute a small part of their total business. The second class is made of that group of respondents commonly known as order buyers. They specialize in buying livestock on order and do no selling on a commission basis.

52. The nature of the business in which the respondents are engaged is such that it may be carried on under different types of organization. Among the respondent firms there are individual proprietorships, partnerships, and corporations. One of the respondent firms is operated as the branch house of a firm maintaining its principal headquarters at another market. Two of the respondents are organizations of producers engaged in operating on a co-operative plan. These return their profits, or a portion of them, if any, to the members on a patronage basis. Four of the respondent firms are registered to handle sheep only. All others engaged in selling and buying livestock hold themselves out to the public to handle cattle, calves, hogs, and sheep. Some order buyers specialize in the handling of one species of livestock and others handle all species.

VII. Service Rendered by the Respondents

53. The livestock commission business carried on by the respondents is conducted on the premises of the stockyard company. The physical handling and caring for the animals and their selling and weighing, take place in pens belonging to the stockyard company and assigned by it to the various respondents. The office work growing out of the sale of the animals and the accounting to the owner for the proceeds of sale is carried on in the Exchange Building also owned by the stockyard company. The respondents do not pay for the use of the pens but pay rent for the office space which they occupy in the Exchange Building. The rendition of the services of selling and buying livestock makes it necessary for the respondents to employ assistants in the yard and in the office. There is a wide variation among the firms as to the character of their organization and

52 in the extent to which work can be specialized. A relatively small volume of business does not permit of that degree of specialization which is possible in the case of a firm which receives a large volume of business. Most of the larger firms have a separate department for each species of livestock handled and usually place a head salesman in charge of each department. In some instances divisions exist within a department as, for instance, in the case of those firms which handle a large volume of business. Such firms may have a fat steer division, a stocker and feeder division, a butcher cattle division, and a calf division. On the buying side of the market each buyer is generally looking for a specialized grade or class of livestock. Those packers who are represented by salaried buyers have special buyers for the different grades and classes of cattle. Specialization has not been carried to the extent in the case of hogs and sheep that it has in the case of cattle. Order buyers are usually in the market for distinct grades and classes of livestock. Dealers generally do not specialize to any great extent. Their market function is to buy mixed grades and classes of livestock and then to sort them in accordance with the needs of the trade. In some cases the owner, or owners, of a small firm do much of the yarding and office work in addition to the selling of the livestock.

54. The situation with respect to specialization among salesmen applies in general to the yarding and office work. The large firms divide their help into divisions in the cattle alleys and place each division in charge of a head yardman. In the larger firms the various office employees are frequently assigned to special tasks or departments under the supervision of an office manager. As a general rule the yard work is heaviest in the early part of the day and the office work heaviest in the latter part of it. Because of this, some of the office employees may assist in the yard work in the forenoon and some of the regular yard employees may help in the office in the afternoon. The organizations are flexible and permit a high degree of cooperation among the employees of a firm.

55. Some of the respondent firms do not have sufficient livestock of certain species to warrant the maintenance of a selling organization. Many firms, for instance, do not have sheep salesmen. These firms engage the salesmen of some other firm. This arrangement concentrates the selling and yarding of sheep in the hands of a comparatively few firms, and thus makes possible a high degree of efficiency. A firm which does not elect to sell the sheep consigned to it assesses the regular commission charge against the consignor and with a part of this revenue pays someone else for selling the sheep. Each firm handles all the office and accounting work growing out of the sale of sheep consigned to it. An arrangement similar to that described for the handling of sheep is sometimes entered into with respect to hogs and cattle, but in the case of the latter species the arrangement is less frequent than in the case of sheep. A few firms do not maintain their own office force but engage other respondent firms to do their office work for them.

56. Most of the livestock received for sale at the Kansas City market arrives during the early morning hours. It is important that the livestock be handled expeditiously in order that it may be watered, fed, and sorted in time for the market. The bulletins prepared by the stockyard company with respect to the arrivals of livestock are hung in the train office building, and there respondents' employees go to obtain information as to arrivals. Frequently they obtain additional information in regard to consignment from letters, telephone calls, and personal contact with shippers. As soon as the information is obtained, the representative of the commission firm goes to the designated place near the track where the livestock is unloaded and obtains a chute slip showing the car number and the number of chute in which the stockyard company has placed the livestock.

57. Rail arrivals of sheep are driven from the unloading chutes to the pens of respondent market agencies, and formal delivery is made there. Cattle and hogs arriving by rail are delivered to the respondents at unloading chutes or near-by pens. After the representative of the commission firm has ascertained the pen in which the livestock has been placed, he goes to the representative of the stockyard company who is in charge of the particular division, and requests delivery. This representative of the commission firm is usually called a "train runner." The livestock is counted out of the pen into the alley, and a train runner then goes ahead of it, leading the way to the pens assigned to his firm. In the case of cattle

54 and calves delivered at the unloading chutes, the stockyard company furnishes a man to go behind each load of livestock. During periods of heavy runs a train runner may lead a procession containing a number of carloads, each kept separate from the other by a stockyard employee. Such assistance is not furnished by the stockyard company in the case of driving hogs, nor in those instances where cattle are yarded temporarily in holding pens. When live-

stock reaches the pens of a commission firm, it is counted into the pens, usually by the head yardman for that firm. In the case of night arrivals during the season of heavy runs of cattle, some firms maintain a night train runner, either as an individual employee or one employed jointly with other firms.

58. Pens are assigned to the various commission firms in the different divisions of the yard. These assignments are made by a committee. The number of pens assigned to each firm is governed by the volume of business handled, and the location is governed largely by the length of time during which a firm has been in business.

59. Sheep arriving by truck are delivered at the sheep division. With respect to truck arrivals of hogs and cattle, it is necessary for the respondents to drive the livestock from the truck unloading chutes or near-by holding pens to their respective pens in the regular divisions. This work is accomplished either through individual employees or through those who make it their business to drive livestock at a stipulated head charge. The stockyard company makes available information in regard to truck arrivals of livestock through notification slips placed in boxes at the respective drive-in unloading chutes.

60. In taking custody of livestock consigned to them for sale respondents' employees make such records and memoranda as will enable them to preserve the identity of each consignment. Through experience gained in handling livestock, these employees can often identify animals once they have seen them. Frequently a consignment of livestock is owned by two or more people. Such livestock is usually marked in some distinctive way in order to maintain the identity of each owner's livestock. There are also frequent shipments of branded livestock, and these brands serve as a basis for identifying ownership.

55 61. Occasionally some of the livestock contained in a consignment is intended for a market agency other than the one to which it is billed. Such livestock is placed in a separate pen. The receiving agency then notifies the firm to which the livestock is to be delivered, and that firm removes the animals to its pens.

62. Traders who buy and sell in the yard for profit sometimes place their livestock with the respondent firms to be sold. This is called "planting" and such livestock is referred to as "seconds." In such cases the traders usually drive their livestock to the commission firms' pens.

63. Upon receipt of livestock in its pens an employee of the commission firm, usually the head yardman, orders feed from the stockyard company, which maintains the equipment for the delivery of the feed and employees who do the feeding. The employee of the commission firm keeps the record of the amount of feed ordered. Sometimes the head yardman will sort and grade the livestock before feeding. As soon as it has been fed and graded, it is watered. Frequently when pens are available, a consignment of livestock will be divided into several bunches in order to enable the animals to drink

with less confusion. Some of the work of preparing livestock for sale is done by the yardmen. When the salesmen arrive in the yard they may do further sorting and grading.

64. The regular market hours are from 8 a. m. to 3 p. m., but the stocker and feeder class of livestock may be bought or sold at any time. Salesmen usually go to their offices some time before the market opens and review available information, in order that they may judge the trend of the market. In many instances salesmen have seen the cattle in the country before they were shipped. Frequently the owners telephone or write to the salesmen about the shipment. Sometimes shippers will accompany their shipments and give the salesmen helpful information in regard to the livestock to be sold. Salesmen also check up on the condition of the previous day's market. They obtain similar information in regard to the other livestock markets. They ascertain the estimated receipts of livestock at the Kansas City market and other markets for that day and opening prices for the day at other markets, in so far as such information is available.

56 65. The salesman then goes to the yard to look over the consignments and does whatever sorting is, in his opinion, necessary. When the market opens the buyers go to the pens where they, in company with the salesman, look at the livestock. According to the custom of the market only one buyer is taken into a pen at one time. If the livestock is suitable for the buyer, an offer and a bid are made. If a sale is not consummated, the buyer goes on to some other salesman, and the livestock is shown to the next buyer. On some days the buyers are very active and go out into the yard as soon as the market opens. On other days the buyers go out late in the forenoon and are slow to buy. There are many factors, the more important of which are the activity of the consuming demand and the supply of livestock, which determine whether a market is active or dull. It is bargaining among salesmen and buyers which finally determine what the market prices for the various grades and classes will be each day. The market may be strong at one time of the day and weak at another time. It is necessary that salesmen study the forces which affect the market from hour to hour, in order to determine in their own mind the best time at which to sell their livestock. Sometimes, although not frequently, a shipper will instruct a salesman not to sell livestock under a stipulated price. However, generally speaking, the shipper leaves this matter to the judgment of his salesman. In addition to the study of information in regard to supply and demand as factors affecting prices, a salesman must also be a judge of the factors which affect the value of livestock. In view of the fact that there is a wide margin between the prices paid for the highest quality of cattle and the lower grades of cattle, it becomes a very responsible task for a salesman to judge accurately the grades of cattle which he has to sell.

66. Once the market is made, sales are consummated rapidly, and the movement of livestock to the scales for weighing begins. The yardmen usually drive the livestock to the scales, although the

salesmen in some instances assist in this work. As soon as sales are consummated the salesman gives his yardman information in regard to the names of the owner and the buyer, and how the livestock is to be weighed, if special sorting at the scales is required
57 by the buyer. The yardman gives the weighmaster the information as to the owner and purchaser of the livestock when the livestock is driven on the scales. The weighmaster records this information on the scale ticket. When the livestock is driven off the scale, it becomes the property of the purchaser, and the employees of the stockyard company take possession of it and yard it for the buyer. Copies of scale tickets are taken by the yardman to the salesman, either in the yard or in the office, and the salesman marks the price thereon.

67. Respondents also assume certain responsibility in connection with the determination of the credit of the buyers of livestock. They know those who are members of the clearing house and do not hesitate to sell livestock to such members. If the prospective buyer is not a member of the clearing house, it is necessary to investigate his credit. A large percentage of the purchases are made by those whose credit is already known to respondents' salesmen.

68. The price of crippled and dead animals is determined upon a salvage basis. Standing arrangements are had with the Standard Rendering Company in connection with the price paid for dead animals, and similar arrangements with packers govern the determination of the prices paid for crippled animals. In this manner the crippled and dead livestock can be handled promptly and with the greatest convenience to all concerned.

69. In the cattle division there are many small lots of livestock to be weighed. There are frequent drafts consisting of only one or two head. This condition prevails especially in connection with the many grades and classes of butcher livestock. The larger commission firms maintain what is known as a "jack pot" man. He is one who possesses the peculiar ability to identify many different animals as to ownership and buyers. As a salesman consummates the sales of these individual head or small lots, he advises the "jack pot" man, who turns the animals into the alley. When he has accumulated a convenient number of head, he drives them to the scale where he sorts them according to ownership and purchaser. Special scales are maintained for weighing "jack pots." This procedure makes it possible to economize in time and equipment in handling this character of business.

58 70. Those who are engaged in the business of buying livestock undertake to inform themselves in the same way as the salesmen do. Those who buy livestock on order will make a survey of the livestock in the yard to determine the supply of those classes and grades which are suitable to their orders. After they find a good supply of the kind of livestock which they know some of their customers use in their trade, they may telegraph or telephone to their customers, give an estimate of the price, and the prospect of obtain-

ing supplies that will meet their particular requirements. Sometimes these customers place standing orders with their buying representative at the market. Frequently customers come to the market and accompany the buyers as they go about the yard looking for the kind and class of livestock desired. Sometimes order buyers will buy livestock when the price appears favorable and then obtain the orders later. One of the chief qualifications of a buyer is to be able to judge the killing qualities of slaughter livestock and the feeding and finishing qualities of stockers and feeders. In case the customer is a countryman or some one not known to the buyer, it is necessary to investigate his credit. Usually those who are not regularly engaged in business at the market do not pay cash or the equivalent of cash for their livestock. The order buyer must pay for the livestock promptly, and in many cases it will be several days before payment by the customer is realized.

71. If livestock is purchased to be shipped out, the buyer orders the necessary cars from the railroad company as soon as the purchase is made. Then he ascertains the number of head and the pen in which the livestock is held, and gives this information to the railroad. In case of stocker and feeder livestock which is bought to go back to the country, there are certain incidental services which may be necessary, such as branding, dipping, dehorning, and vaccination. Although these services are performed by the stockyard company, the yardman for the buyer supervises such operation. When the livestock is ready for shipment, the loading out is done by the stockyard company's employees. It is customary for a yardman or someone representing the buyer to supervise this work.

59 72. The office work in connection with the buying and selling of livestock consists primarily in rendering accounts to shippers and purchasers and making remittances and collections, as the case may be. Forms known as account sales are used in rendering accounts in the case of livestock sold. One of these forms is prepared covering each consignment, showing the name of purchaser or purchasers, the number of drafts, the number of head, weight, and price of each draft, gross proceeds, items of expense such as freight, feed, yardage, commissions, and other deductible items, and the net proceeds. A copy of this is sent to the owner. In case of plural ownership consignments the accounting may be handled as in the case of single ownership consignments, in which event the prorating is done at the shipping point. However, it happens frequently that a commission firm is requested to do the prorating, which consists in figuring the gross proceeds of sale of each owner's livestock, the various expenses prorated to each owner, and the net proceeds of sale of each. Sometimes a request is made for individual account sales for each owner in a plural ownership consignment. In connection with the purchase of livestock an account purchase is prepared somewhat in the same manner as an account sale, giving the details as to the transaction, including the cost and any local expenses, such as com-

missions. Bills for the purchase of livestock which are presented are checked before the account purchase is made out.

73. The respondent market agencies which are engaged in selling livestock have followed the practice for a number of years of remitting the proceeds of sale of livestock through the bank. Usually the shipper will designate the bank to which he desires that the proceeds of sale be sent. Respondents have available to them information with respect to the various Kansas City banks which are correspondents of the local banks throughout the Kansas City trade territory. As soon as the net proceeds of sale have been computed, a commission firm will place an order with its bank to deposit the proceeds to the credit of the shipper at his bank. If requested, this transaction is handled by telegraph rather than by mail. A special effort is made by all market agencies to remit as promptly as possible, and the remittances are made as soon as the net proceeds of sale of each consignment can be ascertained, even though the collections from the buyers have not been made. Usually remittances of proceeds

60 from the sale of truck-in livestock are made by firm check. In some cases such proceeds may be remitted through the bank or by cashier's check. Most of the collections are made through the clearing house. The packers, order buyers, and brokers who clear traders are members of the clearing house, and under the rules of that organization there are certain time limits within which they must remit through the clearing house for the livestock which they have purchased. Order buyers usually draw drafts upon their customers as soon as the livestock has been shipped, or they may take their customer's check. It seldom happens that a customer in placing an order will advance the cash.

74. Salesmen and members of respondent firms spend considerable time in the office interviewing shippers. This is done usually after the selling is completed. If shippers are not at the market, a salesman will write a letter to each one for whom he has sold livestock that day, giving information in regard to the transaction and such other general market information as he may deem helpful to his customer. However, this is not always done with respect to livestock received by truck.

75. There exists an arrangement between each of the respondents and the stockyard company whereby the latter, acting as agent of the carrier, will make formal delivery of livestock before freight charges on the consignment are paid. The stockyard company requires each respondent market agency to which livestock is shipped to furnish a bond covering the payment of freight, yardage, feed, and any other charges. These charges are deducted from the gross proceeds of sale of livestock before remittances are made to the shippers. The bills for these items are presented to respondents through the clearing house.

76. Each respondent furnishes a bond conditioned upon the faithful and prompt remittance of the proceeds of sale of livestock and the prompt execution of orders and the payment for livestock bought

on order. Such a bond is required by the rules of the Kansas City Live Stock Exchange of its members, and such a bond is required of all market agencies under the provisions of the Packers and Stockyards Act and the regulations promulgated thereunder.

61 VIII. Personal Service Character of Respondents' Business

77. The livestock commission business is essentially of a personal service character. The amount of capital necessary to conduct it is relatively small. The use of certain material equipment, however, such as office furniture and fixtures, and equipment of more or less elaborate character, automobiles and horses, is essential in the rendition of the service. The automobiles are used for trips to the country both to solicit shipments and to appraise livestock. They also are used for travel to near-by feedyards whereat livestock may be under the control of respective respondent firms while it is being fed and also whereat respondents sometimes consummate sales of livestock. In some instances the automobiles are owned by the respondent firm which uses them. In others they belong to a member or employee of the firm and their use is compensated for on some prearranged basis, such as actual expense or mileage. The horses are used in the cattle yards and are ridden by the cattle salesmen in the course of their handling and selling of cattle. In some instances they also are ridden by patrons who either have cattle consigned to respondents for sale or else are seeking to purchase cattle from respondents. In some instances these horses are owned by the respective respondent firms who use them. In others they are the property of the individual salesmen who may be owners or employees of a respondent firm. In still other instances they belong to the stockyard company and are rented, as occasion requires, at an agreed rental usually on a time basis.

78. In addition to the more or less permanently invested capital enumerated above, a certain amount of cash working capital is required. The business is essentially a cash one. That is to say, it comprises the receipt and remittance of the proceeds of sale of property owned by its patrons. Nevertheless, only those sales of livestock which are billed to the purchaser prior to 2 o'clock p. m. on the day of sale are paid for on that day. Respondents follow the practice of remitting the proceeds on the day of sale. Such remittances are made by deposits in banks at Kansas City for transmission to the banks of respondents' patrons. This form of remittance is desirable because it eliminates the so-called "float." It requires, however, that each respondent firm have on hand or available through bank

62 credits, a sufficient amount of working capital daily to cover the difference between the total proceeds of sales made each day and the total collections realized on that day. A greater need for cash working capital arises from respondents' activities in the purchases of livestock for their customers. The custom of the mar-

ket place is such that this livestock must be paid for not later than 10 o'clock a. m. of the day following its purchase. The patron, who usually is a feeder, rarely comes to the market in position to make cash payment. This is partly at least because he does not know in advance exactly what the monetary requirements are to be and because in many instances he cannot arrange credit with his local bank until after the arrival of the livestock at his railroad station or farm. It appears impracticable to avoid extension of credit to these patrons. The livestock so purchased is paid for by the respondent firm and a draft is drawn on the patron through regular banking channels. Such drafts ordinarily are paid within from two days to two weeks, but infrequently may require more time.

79. The revenue of respondents' business consists of commissions charged by them for the sale and purchase of livestock. By far the greater portion of it comes from sales. The revenue from sales is deducted from the gross proceeds of such sales and therefore is received daily. This practically does away with any necessity for accounts receivable except in those infrequent instances in which a respondent firm advances money to a patron in contemplation of the sale of livestock, either already received at or on its way to the market. In the buying of livestock the receipt of commissions customarily is delayed from two days to two weeks. Some of respondents' cash requiring expenses are paid in advance, necessitating a small amount of working capital for that purpose. There is a further need for working capital to tide over those seasons when the low run of livestock may not produce enough income to maintain the overhead expenses of the business. It is not altogether practicable for a commission firm to expand and contract its organization to meet the fluctuation in receipts of livestock. Additional yard help may be hired during the heavy seasons but there are certain employees, such as salesmen, who must by the nature of the business be retained throughout the year.

63 80. The stockyard company required of those engaging in business on the market a bond covering, among other things, the payment of the freight, feed, and yardage charges. In addition to the formal requirements of registration and the filing of a tariff, the Packers and Stockyards Act, 1921, as amended, requires each market agency to give a bond covering the faithful and prompt remittance of proceeds of sale of livestock, and the prompt and faithful execution of orders for the purchase thereof and the payment for such purchases. The maintenance of these bonds necessitates a small amount of capital.

81. By far the greater part of the service rendered by respondents to their patrons comes not from the employment of property or money but the application by respondents and their more responsible employees of a personal skill, judgment, and integrity. Such skill and, to a considerable extent, judgment result from the training and experience required by respondents and their more responsible em-

ployees in the course of that development whereby one who enters the business in youth as a yardboy or minor office employee grows into a salesman, proprietor, or supervising office employee. While general scholastic training is not unusual among respondents, the character of the business is such that one may become better fitted for the higher positions by entering the low positions requiring little, if any, previous experience, and learning the business while working up to the better places. The personnel of the business may be divided into those whose major work is performed among the livestock in the pens and alleys and those whose time principally is spent in the offices. The first of these usually enter the business as young men with a background of livestock experience on farms. Nearly always they begin as yardmen for the commission men, however, in some instances as yardmen or other employees of the stockyard company. As yardmen they work side by side with and as assistants of the salesmen. Through this association they acquire the skill requisite to beginning as salesmen. While still yardmen they are permitted, from time to time, to sell livestock under the supervision of the salesmen, and later to sell small consignments of less important grades and classes on their own responsibility. This leads them to the position of salesmen when a vacancy occurs in the sales force.

64 The salesmen come in personal contact with the patrons and acquire a personal following which may become sufficiently large to enable them to acquire a membership in the firm by which they are employed, or to establish a new firm of their own.

82. The method of advancement to the higher office positions is not dissimilar from that which has been described with respect to the employees who work in the yard. In neither instance, however, have the more responsible employees and proprietors always worked up in the particular firm with which they are presently associated. In some instances, of course, the requisite experience has been gained while associated with other commission firms at Kansas City or at other livestock markets or while employed by a stockyard company or engaged in some activity related to the marketing of livestock at public stockyards. However, the rule is that the personnel holding the more responsible positions have gained their knowledge as an incident of employment in lesser positions at salaries compensatory of the services performed in those positions.

IX. Rates Charged by Respondents for Services Rendered

83. Respondents who were members of the Kansas City Live Stock Exchange filed to become effective on January 1, 1926, their tariff No. 2, setting forth all rates and charges for selling and purchasing livestock on the Kansas City market. Each of such respondents filed its separate supplement No. 3 to Tariff No. 2, effective January 1, 1930. This supplement contained rates and charges assessed by each respondent filing said supplement to cover the charges

made for insurance on livestock in the yards. With this supplement there was filed Tariff No. 2 as modified by Supplement No. 2 thereto. Certain of the respondents, pursuant to provisions of Tariff No. 2, as amended by Supplement No. 2, filed their individual tariffs covering their rates and charges for purchasing livestock. On May 11, 1932, and prior to the issuance of the Acting Secretary's order of May 18, 1932, all respondent commission firms (i. e., those who sell livestock on a commission basis), and all the respondent order buyers except three filed severally a uniform tariff of rates and charges for selling and buying livestock to become effective on May 23, 1932. The two respondent cooperative commission firms filed schedules, effective on June 18, 1932, in conformity with the order of May 18, 1932. These two cooperative agencies later filed schedules, effective on October 10, 1932, modifying somewhat their commission charges.

84. A summary of the tariffs of respondents, other than the cooperative market agencies, now in effect at the Kansas City market follows:

SELLING CHARGES

Cattle and Calves Arriving by Rail:

Calves:

1 to 20 head, average weight 400 lbs. or under	30¢ per head
All over 20 head	25¢ " "

Yearlings and Cattle:

1 to 20 head, average weight 400 to 800 lbs.	60¢ " "
All over 20 head	40¢ " "

Cattle:

1 to 20 head, average weight 800 lbs. and over	70¢ " "
All over 20 head	60¢ " "

Cattle and Calves Arriving by Truck:

Calves:

2 to 20 head, averaging 400 lbs. or under	30¢ per head
All over 20 head	25¢ " "

Yearlings and Cattle:

2 to 20 head, averaging 400 to 800 lbs.	65¢ " "
All over 20 head	45¢ " "

Cattle:

2 to 20 head, averaging over 800 lbs.	70¢ " "
All over 20 head	60¢ " "

Minimum Charge for One Head.

Calves—40¢.

Cattle—80¢.

Hogs:

1 to 40 head, averaging over 130 lbs.	25¢ per head
All over 40 head	10¢ " "
1 to 50 head, averaging less than 130 lbs.	20¢ " "
All over 50 head	5¢ " "

Minimum Charge for One Head.

Sheep or Goats Arriving by Rail:

For the first 120 head in each ear	10¢ per head
Additional head over 120 to 160 head	5¢ " "
Each additional head over 160 head	4¢ " "

Sheep and Goats Arriving by Truck:

For each 300 head or part thereof:

1 to 10 head	25¢ per head
11 to 40 " "	20¢ " "
41 to 60 " "	15¢ " "
61 to 300 " "	4¢ " "

Minimum Charge for One Head—35¢.

66

BUYING CHARGES

Cattle and Calves Shipped out by Rail:

Cattle and Calves, 50¢ per head; minimum \$12 a car; maximum \$15.

Calves, 30¢ per head, with a maximum of \$15 per car.

Cattle Trucked Out:

50¢ per head; maximum \$15 for 22,000 lbs.

Cattle Shipped out for Slaughter, \$15 a car.

Cattle trucked out for Slaughter, 50¢ a head, maximum \$15 for 22,000 lbs.

Hogs:

Feeders and Stock Pigs:

Up to 50 head, 20¢ per head.

51 head and above, 5¢ per head.

Slaughter Hogs:

Up to 50 head, 20¢ per head.

51 head and above, 5¢ per head.

Sheep or Goats Shipped out by Rail:

\$12 single deck; \$16 double deck.

Sheep or Goats Driven or Hauled out:

Up to 125 head, 20¢ per head; maximum \$12.

Above 125 head, 15¢ per head additional; maximum \$16 up to 250 head.

A summary of the tariffs of the respondent cooperative market agencies now in effect at the Kansas City market follows:

SELLING COMMISSIONS

Straight cars	Head	Minimum		Maximum	
		S. D.	D. D.	S. D.	D. D.
Cattle.....	\$0.60	\$13.00		\$15.50	
Calves.....	.30	13.00		15.50	\$18.50
Hogs.....	1.20			12.00	16.00
Sheep.....	1.10			12.00	17.00
	.15	10.00			

¹ Up to 40 head.² Each additional head over 40.

67. Mixed Cars:

Cattle—65¢ per head. Not to exceed \$15.50 for the cattle in a car.

Calves—32¢ per head. Not to exceed \$15.50 for the calves in a single deck or \$18.50 for the calves in a double deck car.

Hogs—25¢ per head up to 40 head. 10¢ per each additional head over 40; not to exceed \$12 for the hogs in a single deck car, or \$16 for the hogs in a double deck car.

Sheep—15¢ per head. Not to exceed \$12 for the sheep in a single deck or \$17 for the sheep in a double deck.

Drive-Ins:

Cattle—65¢ per head with a maximum of \$16.50 up to and including each 27 head.

Calves—On each 75 head of calves or fraction thereof in one consignment belonging to one owner the rates shall be determined as follows: 30¢ per head with a maximum charge of \$16.50 up to and including 55 head; 25¢ per additional head above 55 with a maximum charge of \$17.50 up to and including 75 head.

Hogs—25¢ per head up to 40 head, inclusive; 10¢ per each additional head with a maximum charge of \$14 on any one consignment.

Sheep—On each 250 head of sheep or fraction thereof in one consignment belonging to one owner the rate shall be determined as follows: 20¢ per head with a maximum of \$13.00 up to and including 125 head. 15¢ per additional head above 125 with a maximum charge of \$18.00 up to and including each 250 head.

BUYING COMMISSIONS**Cattle or Calves:****Non-Slaughter:**

(a) Shipped out—50¢ per head with a minimum of \$12 and a maximum of \$15 per car.

(b) Trucked or driven out—60¢ per head with a maximum of \$16 and 22,000 pounds shall be considered as the maximum weight to be purchased at this maximum rate.

Slaughter:

(c) Shipped out—maximum \$15 per car.

(d) Trucked or driven out—60¢ per head.

Hogs:

(e) Slaughter—\$7.50 for single deck car; \$12 for double deck car.

68 (f) Stock—\$12 for single deck car; \$20 for double deck car:

Driven or Hauled out:

25¢ per head up to 48 head.

On larger lots carload rates; 120 head to be considered a single deck load.

Sheep or Lambs:

(g) Sheep or lambs \$12 per single-deck and \$16 per double-deck car.

(h) Sheep or lambs driven or hauled out, 20¢ per head or a maximum of \$12 up to and including 125 head. 15¢ per additional head above 125 with a maximum charge of \$16 up to and including 250 head.

The foregoing are the basic rates but do not include all charges made. There are, in addition, provisions in respondents' tariffs for certain extra service charges, minimum charges on consignments, and special charges for selling the livestock of dealers. Besides these there are other miscellaneous provisions with respect to the application of the rates.

X. Volume of Business Handled by the Respondents

85. The revenue producing business of the respondents consists of livestock sold and livestock purchased on a commission basis in the Kansas City Stockyard and to a comparatively slight degree at points away from Kansas City. The volume discussed under this heading relates to that portion of the business of the respondents transacted at the Kansas City market. Most of the respondents who sell livestock also purchase it on order and charge a commission therefor. Such purchasing is the principal business of certain respondents known as order buyers.

86. While in this order the unit principally used for rate making purposes is the head of each respective species of livestock, simplicity and clarity in the statement of relative revenue producing volumes of the respective respondents require the use of some common denominator. This is for the reason that the commissions for the sale or purchase of a single head of cattle necessarily exceed to a considerable degree such commissions with respect to a hog or a sheep. The fact that a carload of hogs or sheep contains many more animals than
69 a carload of cattle brings the commission revenue produced from it much more nearly on a level with that produced from a carload of cattle. Therefore, in this discussion of the revenue producing volume, the livestock of each species handled by each respective respondent commission firm is reduced to carload equivalents based upon the average number of animals per car of the particular species contained in the total number of straight cars of that species received

by the particular respondent during the years 1929 and 1931. The following table sets forth the number of cars of livestock of all species received by each of the respondents:

VOLUME HANDLED BY COMMISSION MEN IN 1929

Firm No.	No. of cars	Firm No.	No. of cars	Firm No.	No. of cars
33	114	8	851	34	1,894
40	131	23	871	28	1,930
37	162	5	879	14	2,124
72	165	39	950	25	2,147
66	178	60	1,000	42	2,288
80	277	77	1,022	18	2,381
86	365	44	1,039	12	2,958
85	421	16	1,204	83	2,980
78	449	75	1,208	71	3,117
79	449	29	1,285	13	3,343
11	456	4	1,302	84	3,641
43	492	62	1,306	51	3,786
74	499	48	1,367	73	4,051
31	512	7	1,382	35	4,394
67	555	70	1,409	10	4,913
1	590	55	1,441	30	4,995
61	611	52	1,463	82	5,415
76	612	33	1,583	46	7,552
6	642	65	1,625	54	8,158
17	699	26	1,739	63	8,577
20	805	56	1,775	59	8,778
15	829	08	1,838		

Of these 65 firms listed above, 11 firms handled over 50 percent and 25 firms handled over 75 percent of business received by all.

VOLUME HANDLED BY ORDER BUYERS IN 1929

Firm No.	No. of cars	Firm No.	No. of cars	Firm No.	No. of cars
49	11	69	233	32	1369
47	34	39	446	51	1978
24	75	3	450	64	2771
48	79	38	917	57	3309
40	102	21	1121		

VOLUME HANDLED BY COMMISSION MEN IN 1931

Firm No.	No. of cars	Firm No.	No. of cars	Firm No.	No. of cars
37	67	52	820	34	1984
23	72	5	857	25	1999
72	88	75	872	42	2022
67	91	60	905	18	2092
88	99	77	906	55	2219
11	106	29	962	71	2234
66	112	16	988	35	2418
1	257	20	1039	12	2450
74	314	7	1067	13	2475
9	364	26	1161	73	2936
79	381	23	1239	51	2976
78	421	4	1241	84	3021
76	424	44	1261	82	3741
61	425	56	1263	83	4130
67	432	62	1292	26	4996
17	446	33	1297	46	5041
19	447	65	1372	10	5699
6	605	70	1382	63	6009
15	702	48	1421	59	7022
43	785	11	1641	54	8544
30	811				

Of the 61 firms listed above, 11 firms handled over 50 percent and 23 firms handled over 75 percent of the business received by all.

Firm No.	No. of cars	Firm No.	No. of cars	Firm No.	No. of cars
101.....	3,417	104.....	290	106.....	812
102.....	2,103	105.....	99	107.....	570
103.....	892				

XI. Gross Revenues

87. The respondent commission firms vary among themselves in the amount of gross revenues received from the sale of livestock consigned to them. These differences are due, for the most part, to variation in the volume of livestock received by them. Some of them, however, are attributable to a lack of uniformity in the character of business received. The livestock consigned to some firms may run heavily to one species and grade and that of another to another species and grade.

88. The following tables show for each firm the gross selling and buying commissions received from Tariff No. 2 in 1929 and in 1931

COMMISSION MEN

Firm No.	Amount	Firm No.	Amount
1929		1931	
33.....	\$1,943.32	37.....	\$1,199.90
41.....	2,228.05	38.....	1,522.00
72.....	3,021.40	72.....	1,695.00
37.....	3,115.05	85.....	1,832.00
66.....	3,326.40	11.....	1,845.00
80.....	4,658.92	66.....	1,983.00
86.....	6,386.20	67.....	2,467.00
85.....	7,073.30	1.....	3,600.00
11.....	7,224.28	9.....	5,687.00
79.....	8,224.73	74.....	5,923.00
78.....	8,363.23	79.....	7,446.00
74.....	8,523.07	73.....	7,563.00
67.....	9,347.92	61.....	7,718.00
31.....	9,697.15	76.....	8,097.00
61.....	10,187.30	19.....	8,185.00
1.....	10,317.35	17.....	8,421.00
76.....	10,908.58	87.....	8,883.00
43.....	11,246.92	6.....	11,688.00
6.....	11,564.97	52.....	14,781.00
17.....	12,195.40	15.....	14,911.00
23.....	14,903.85	30.....	15,428.00
72.....	15,271.95	77.....	15,927.00
8.....	15,603.20	75.....	16,274.00
15.....	17,024.20	60.....	17,078.00
5.....	17,310.69	43.....	17,419.00
77.....	17,657.03	5.....	17,556.00
30.....	17,971.15	29.....	18,286.00
60.....	19,297.77	16.....	18,837.00
75.....	20,710.51	20.....	19,581.00
16.....	22,431.33	7.....	20,073.00
62.....	23,139.40	23.....	20,792.00
4.....	23,171.64	25.....	21,897.00
29.....	23,801.71	4.....	22,336.00
44.....	25,014.27	56.....	23,193.00
48.....	25,910.35	62.....	23,488.00
53.....	26,038.80	53.....	23,881.00
7.....	26,481.24	65.....	25,613.00
58.....	26,770.90	70.....	26,391.00
70.....	27,154.97	48.....	27,216.00
53.....	28,775.67	44.....	27,679.00
56.....	30,627.84	34.....	29,041.00
65.....	31,275.50	14.....	32,208.00
26.....	31,517.40	25.....	34,280.00
68.....	31,603.26	18.....	37,283.00
34.....	31,992.53	42.....	39,296.00

COMMISSION MEN—Continued.

Firm No.	Amount	* Firm No.	Amount
1929		1931	
2.	\$34,325.90	55.	\$40,949.18
14.	37,534.95	71.	41,474.09
25.	38,382.32	35.	45,007.41
16.	42,551.14	12.	45,066.81
6.	43,228.85	13.	47,563.60
53.	50,133.21	73.	51,233.80
12.	52,653.11	84.	52,999.55
71.	53,301.19	51.	54,703.22
11.	61,483.65	82.	67,812.70
84.	61,984.59	83.	68,677.00
51.	65,065.77	46.	91,216.54
73.	72,448.32	36.	99,769.35
35.	78,574.95	10.	102,078.98
20.	80,759.27	65.	104,993.75
82.	94,998.17	59.	120,036.08
36.	118,172.84	54.	154,137.19
46.	124,217.91		
60.	148,516.86		
54.	148,609.21		
59.	155,361.93		
	\$2,313,442.99		\$1,911,837.81

73 Of the 65 firms listed for 1929, 11 firms received over 50 per cent of the 1929 revenues; 26 firms received over 75 per cent of these revenues. Of the 61 firms listed for the year 1931, 11 firms received over 50 per cent of the revenues for that year; 24 firms received over 75 percent of the revenues of that year.

XII. Methods Used by Respondents in Getting and Maintaining Business

89. The respondents employ many different methods in their attempts to get and maintain volume of business. They vary somewhat in their opinions as to the relative value of the different business getting and maintaining activities. They are practically unanimous, however, in the view that the most important factor is the rendering of the highest class of service. It is their opinion that a satisfied customer is a firm's best advertisement. Most of the respondent firms send out market letters periodically. These vary in frequency, size and content. They usually contain information about general market conditions and prospects for the future and give an account of some outstanding sale made by the issuing firm. Frequently matters of general interest to live stock producers are incorporated in these market letters. In addition to these, some of the firms get out circulars or cards giving suggestions about sorting and grading and methods of feeding and loading livestock. Those respondents who are members of the Live Stock Exchange are prohibited by its rules from giving presents or gifts in consideration of past or future business. This rule does not preclude the giving of articles, such as lead pencils, memorandum books, and other inexpensive advertising novelties.

90. Some of the respondents advertise in livestock journals and in the local papers in the territory from which they are accustomed to

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receive livestock. A local livestock market paper is published at the Kansas City market. Prior to January 1, 1930, it was the custom of many of the respondents to give free subscriptions to this paper to some of their customers. On January 1, 1930, the respondents who were members of the Exchange discontinued this custom under a rule of the Exchange which became effective on a sliding scale basis within a period of six months. In lieu of this practice, the

74 Exchange began a radio broadcast service for the maintenance of which each member is charged .5¢ per car on the livestock handled. This radio broadcast is in the nature of a joint advertising venture on behalf of Exchange members.

91. Livestock salesmen carry on a considerable volume of correspondence with their customers and thus maintain contacts regarded as so necessary in the commission business. Most of the firms keep a list of customers and prospective customers. In addition to answering inquiries made by customers for market information, some of the firms at such times as they may deem suitable send letters dealing with market conditions which they consider of interest to their customers.

92. Respondents frequently entertain their customers, but a rule of the Exchange prohibits the giving of free meals in the West Bottoms, which is that part of the central industrial district of Kansas City in which the stockyard is located. Outside of this restriction, the amount expended for entertainment is limited only by what each firm may deem expedient in its own case. Throughout the course of the year there are meetings and conventions of producers held in the trade territory of the Kansas City market. It has become customary for many of the respondents to send representatives to these meetings. Attendance thereon affords an opportunity to meet and talk with the producers of livestock. In addition, respondents make special trips to the country for the purpose of soliciting business. Those respondents who are members of the Exchange are prohibited by its rules from employing traveling or livestock solicitors. Only individual bona fide stockholders of corporations and salesmen or buyers of livestock on the Kansas City market, regularly employed in the commission business at Kansas City, may solicit business for the market. Such persons cannot remain in the country on a soliciting trip more than 15 days in each month, subject, however, to certain exceptions in certain stated regions.

93. In an effort to get business many of the respondents have undertaken the rendition of definite services incident to the marketing of livestock, but not immediately associated with the service of buying and selling livestock on a commission basis at the Kansas City market. One of these activities is commonly referred to as
75 "appraisal" or "inspection" work. Some of the shippers, those usually having more than a carload of livestock to be marketed, request members of respondent firms, or their salesmen, to come to the country and look at their livestock. The object of the shipper in requesting this service is to get the opinion of the salesman

as to whether the livestock is in condition to be marketed to best advantage and about what price it may be expected to bring. Frequently on such visits the salesman assists the producer in sorting his livestock and in loading it for shipment. A single shipper sometimes requests this service of more than one commission firm in order to get the benefit of the opinions of more than one salesman. These appraisal or inspection trips are made either by train or by automobile. In near-by territory it is usually done by automobile. These trips are made at the expense of the respondent firms. Inasmuch as this is a free service and respondent firms encourage shippers to avail themselves of it, it is increasing.

94. Several sheep and cattle feeding yards are located near Kansas City to which some shippers send their cattle and sheep to be held and fed anticipatory to marketing it either at such feed yards or at the Kansas City stockyard or some other livestock market. It is customary for the owners of such livestock to ask the commission firms to look after it. The owners often accompany it. Respondents make trips, sometimes with the owners, to these feeding yards to look over the livestock and render sundry services in connection with it, such as sorting, supervising, and feeding it and arranging for shearing of sheep and the selling of the wool, if shearing is deemed necessary. No separate charge is made for these services. At the time of the second hearing in this case cattle and sheep were being bought and sold at some of these neighboring feeding yards.

95. The leasing of pasture land for the use of those customers who have cattle to graze has become an important activity for some of the respondent firms. The Kansas City market is near the Flint Hill section of Kansas and the Osage country of Oklahoma, which are extensive grazing areas. Many stockmen throughout the Southwest request their commission firms at the Kansas City market to obtain pasture for them in these grazing regions. The re-

76 spondent firms that render this service make it a point to keep informed in regard to the available pastures, in order that ready contact may be made with the owners of these grazing lands. A commission firm rendering this service goes out to inspect the pastures in order to determine the condition of the grass, the water supply and the character of the fences, and then reports to the customer. The commission firm also furnishes a form of pasturage contract, which is used when the owner leases the land. After the lease has been made and the owner has shipped this livestock to the pastures, a representative of the commission firm is usually present when the cattle arrive in order to look after the interests of the owner. While the cattle are grazing frequent trips are made by the interested commission firm for the purpose of inspecting the cattle, the condition of the grass, and the supply of water. Another inspection of the cattle generally is made before shipment to market. No separate charge is made for this service which is rendered in the hope that the commission firm rendering it will receive the livestock for sale on the Kansas City market. It sometimes happens that this

livestock is shipped elsewhere or, if to the Kansas City market, to some other firm than the one which has rendered the service.

96. Some of the respondent firms engage in making loans on livestock. Such firms either loan their own money or negotiate loans through a bank. They may act as the endorser of livestock paper. In those cases in which they endorse the paper, the interest charged is about one per cent above that which prevails in the market. This represents a charge by the commission firm for its services and for underwriting the risk involved. In connection with making loans on livestock it is usually necessary to make an inspection of it. Most of the loans are made at the time the livestock is purchased at the market. In this event the work of inspection does not involve a great deal of time or expense since the details are handled by the regular office force. The respondents do not contend that the livestock loan business is a part of the commission business, but they do contend that it is a business-getting venture and that the expense incurred in connection with it is one properly incurred in the conduct of the commission business.

97. The business-getting efforts of those who buy livestock on order are not so varied. They advertise in papers to some extent and make occasional trips to call upon their customers. Contact by telephone and telegraph is the principal means used by them in getting and maintaining their volume of business.

XIII. Joint Activities of the Respondents

98. With the exception of the two cooperative commission firms and several individual order buyers operating on a small scale, respondent firms maintain the Kansas City Livestock Exchange, which is a voluntary organization not conducted for profit. The object of this association is to maintain uniform customs and certain standards of trade ethics, more particularly outlined in the rules formulated by it. All members of the Exchange are required to observe these uniform rules. The membership of the Exchange is composed of those who engage in the commission business at the market and such others as were once engaged in such business and who have become inactive but have retained their memberships.

99. There exists also an arrangement between the members of the Exchange and the respondent cooperative firms known as a trade practice agreement, whereby the latter two firms, by meeting certain conditions, such as the giving of bonds and agreeing to abide by certain disciplinary measures, can avail themselves of certain facilities maintained by the Exchange. The Exchange is registered as a market agency engaged in rendering certain miscellaneous services, including particularly hog inspection and dockage. It is not a respondent in this proceeding and the reasonableness of its rates for services is not a subject of inquiry here.

100. The Exchange maintains a system of hog inspection and dockage whereby it employs men to inspect these animals for conditions of

health and for certain physical conditions which may exist in some hogs, for which a deduction from the agreed price will be made. The rules of the Exchange definitely prescribe the procedure. If there is dissatisfaction with the dockers' decision, an appeal may be taken to the chief inspector whose decision is final unless an arbitration is called for. The person who calls the arbitration is charged \$1.50. A charge of 20¢ is made on each car of hogs arriving at the market for sale, and a prorata charge is made on truck receipts of 78 hogs to cover the expenses of hog inspection and dockage. This charge is deducted from the proceeds of sale of hogs.

101. The Exchange maintains a clearing house which serves as a central office for the convenient handling of bills rendered and accounts collected. Each firm pays for the use of this facility according to the volume of business handled. The cooperative firms also avail themselves of this service.

102. The Exchange procures and maintains a policy of insurance, protecting livestock against fire while it is in the yard. One-half the premium is deducted from the proceeds of sale of livestock. Traders, packers, and order buyers also make a contribution to a fund used to maintain this insurance. Those agencies which are not members of the Exchange maintain their individual insurance policies and do not enjoy the protection of the blanket policy carried by the Exchange for its members. The collections by the Exchange exceed the premiums, and this excess goes into the general fund.

103. The Exchange has an agricultural development fund. Members are assessed 10¢ per car on inbound shipments, 6¢ per car on livestock bought on order, and 6¢ per car on livestock cleared through brokers. This fund is used in general promotional work, such as livestock sanitation, boys' and girls' club work, and fairs.

104. On March 1, 1930, the Exchange began making an assessment of 5¢ on each inbound car of livestock sold, to support the radio broadcasting conducted by it. This charge is made against those firms which are members of the Exchange. The Exchange also assesses each firm 2¢ per car on all inbound rail receipts to maintain its transportation department. The purpose of this department is to look after train service and the relationship of freight rates as between Kansas City and other markets. The respondent cooperative firms are assessed for this purpose, pursuant to the trade practice agreement.

105. The Exchange charges \$3 per month per membership for the purpose of building up a fund to retire the certificates of membership of deceased members. This is governed by the rules of the

79 Exchange. The Exchange has organized an independent association, composed of members of the Exchange, known as the Kansas City Live Stock Exchange Employees Association.

It has the same officers as the Exchange and is founded and operated under the insurance laws of New York. Contributions to this are made on an individual basis, and the expenses of the association are borne by assessments against individual members.

XIV. Risks Incurred in the Commission Business

106. The record in this proceeding shows the character of the risks to which the respondents are subject in the conduct of their business. These risks are of two general types, namely, those which result in losses of sufficient frequency and definiteness to make it possible for insurance companies to calculate on an actuarial basis the premiums necessary to be charged and those which occur so infrequently and are so indefinite in character as to make this impossible. The former class of risks is insurable, while the latter is not. Insurance premiums paid enter into the expenses of the respondents. The losses incurred on account of uninsurable risks constitute items to be provided for in the reasonable profit allowable over and above reasonable expenses. The respondents claim that these risks affect both their revenues and their expenses. Among those which affect their revenues are the possibility of decline in the production of livestock within the trade territory of Kansas City and the growth of direct buying by packers in that area. Among those risks affecting unfavorably the expenses of conducting their business the respondents enumerated the following: their guaranty against defects in title to livestock sold by them; errors entering into accounting processes; failure of producers to make payment; losses through litigation on account of bank failures; freight undercharges; sales of diseased and defective livestock; loss or damage to livestock while in their custody; public liability; liability to employees; and loss of property through fire. Against insurable hazards most of the respondents carry some insurance but there are others who choose to carry this risk themselves.

107. The respondents are forced by the conditions which surround the conduct of their businesses to carry some of the risks themselves.

80 While the livestock commission business is theoretically a cash business, it frequently happens that respondents make remittances before they have received payment for livestock sold. If the buyer is a regularly registered agency at the market, other than a packer buyer, the payment for the livestock is guaranteed under the buyer's bond. If, however, the buyer is not bonded, there is an element of risk in a sale to such a person in that the purchaser for some reason may not settle for the livestock purchased. It sometimes happens in connection with sales of livestock to a countryman who gives his check or in case of a sale to those who purchase on order that the commission man turns over to the owner the proceeds of sale before collection is made from the purchaser. Besides this, there is also an element of risk involved in the remittance of proceeds to the shipper in that litigation may arise in connection with the failure of a bank in which proceeds have been deposited. Other risks which may be classed as uninsurable are those arising from bad debts, errors, and adjustments which cannot be avoided even by reasonable precaution, losses on account of making loans, and other items of like character. Bad debts are usually incurred in connec-

tion with loans made or credit given to those for whom purchases are made, or the honoring of drafts drawn by shippers before livestock has been sold, the proceeds of the sale of which do not equal the amount of the draft. There is also the possibility of injury to livestock while in the custody of the commission firms resulting from the negligence of the commission firm or its employees. Inasmuch, however, as each commission firm endeavors to render the highest class of service and handle livestock in the most humane manner, the risk of loss from this source is practically negligible.

XV. Economic Changes Since the Year 1929

108. The re-hearing was granted in this proceeding upon the ground alleged by the majority of the respondents in their petitions therefor, namely, that changed economic conditions since the original test year, 1929, had rendered the experiences of that year insufficient as a basis for the determination of reasonable rates. It becomes pertinent, therefore, to note herein the changes shown of record and noticeable under the doctrine of Atchison, Topeka, and Santa Fe Railway Company v. U. S., 284 U. S. 248, which have occurred between the year 1929 and the close of the record in 81 the last yearing in this proceeding. They may be discussed as three general classes, namely (1) general changes affecting the country as a whole; (2) general changes affecting the livestock industry; and (3) particular changes affecting respondents' businesses and revenues.

109. The general economic changes are, in brief, that beginning in the year 1929 the business life of the country has descended from one of the highest levels of activity and prosperity ever known to one of the most severe depressions in our entire national experience. Values of tangible property and of investments, as well as incomes, salaries, wages, and commodity prices have descended to levels lower than were thought in 1929 hardly to be possible.

110. The effect of the general depression was felt severely in the livestock producing industry. Whereas in December 1929, the monthly average prices at Kansas City of slaughter steers ranged from \$9 to \$14 per 100 lbs.; of hogs from \$7 to \$9; and of slaughter lambs from \$9 to \$12; depending upon weight and grade, the comparable prices for December 1931 were: slaughter steers, \$3 to \$10; hogs, \$3 to \$4; and slaughter lambs, \$3 to \$5. It was testified by some of the respondents that at times since the year 1929 the livestock market at Kansas City was so demoralized by lack of demand and consequent low prices that they advised their patrons to withhold shipments of livestock even though so doing tended to decrease the respondents' own revenues.

111. In its effect on the prosperity of the respondents' businesses the general depression manifested itself principally in a decline in the volumes of livestock received by them for sale or bought by

them on commission. As illustrative of this, their total revenue producing fresh receipts of livestock were for 1929: cattle 1,743,165; calves 273,577; hogs 2,140,170; and sheep 1,673,705 head; while for 1931 they were: cattle 1,580,290; calves 236,727; hogs 1,102,425; and sheep 1,817,611 head. There were, of course, corresponding declines in revenues, except in the case of sheep where the increased volume produced a greater revenue. The record having been closed in November 1932, receipts for the entire period of that year are not available. However, those for the first seven months thereof were not quite as great as during the similar period of 1931.

112. In the year 1932, partly, at least, as a result of the general depression and the unfavorable economic condition of their patrons' businesses, respondents reduced their rates to some extent.

113. Notwithstanding the unfavorable business conditions and lowered receipts in 1931, as compared with 1929, few of respondent firms operating in both of those years showed any substantial reduction of personnel in the former as compared with the latter. Also, few firms made any substantial reduction in salaries and wages sufficiently early in the year 1931 materially to affect their cost of doing business as shown in the audits covering that year. Such decreases as were made took place largely in the latter part of the year 1931 and in the year 1932. The general impression gained from the record is, however, that respondents, in the face of almost universal lower levels in the United States, are attempting to maintain their personnel and the salaries thereof at the levels obtaining in the more prosperous year, 1929. This necessarily has a depressing effect upon the net moneys available to the owners of these businesses which may be designated "net owner incomes."

XVI. Principles Governing Determination of Reasonable Commission Rates

114. The Packers and Stockyards Act provides that if, after investigation, the Secretary of Agriculture finds commission rates in effect at a livestock market to be unjust, unreasonable, or discriminatory, he shall prescribe rates that are just, reasonable and non-discriminatory, or the maximum or minimum rates, or the maximum and minimum rates, which are just, reasonable and non-discriminatory. In arriving at such a schedule it is necessary to adopt a guide to reasonableness. The guide adopted in this case is that under ordinary conditions as they prevail on the Kansas City market, a schedule of rates should be high enough to produce sufficient gross revenues to pay all reasonable costs and a reasonable compensation for management and risk, that is, a reasonable profit, to the owner or owners of any firm which receives enough livestock to enable it—handle its business in a reasonably efficient and economic manner. This principle was followed in the Omaha Commission Rate Case, and was approved by the Supreme Court of the United States in the case of

Tagg Bros. and Moorhead, et al., vs. United States (280 U. S. 420).
 83. It becomes necessary, therefore, in following this guide to determine the reasonable costs to the respondents of handling each species of livestock.

XVII: Cost Occasioning Factors.

115. There is a relationship between those factors which occasion work for respondents and their employees and the costs to respondents of rendering the services for which they charge the rates. This relationship, however, is not so direct as to bring about an increase in cost whenever an increase in work arises. This is due to the fact that in many instances the major functions of those engaged in performing the activities of respondents can be carried on only at certain times. For instance, a salesman cannot sell livestock except when the market is open and more or less active, notwithstanding the volume of livestock which he has for sale. On the other hand, the type of men who make good salesmen would hardly be content to accept less salaries in consideration of short hours. They demand and get good pay and are willing to return therefor a reasonable days' and weeks' service. Therefore, the fact that, prior to the selling hours they assist in the yards and that, during the last one or two days of the week they go to the country to appraise livestock and solicit business do not increase the respondents' expenses for salaries. Therefore, in the distribution of costs hereinafter made to functional accounts, the services of a salesman, for instance, are not divided as between selling, yarding, office work and business getting and maintaining, but are considered as being covered by the reasonable allowance for salesmanship. The same is true in principle with respect to the salaries of other workers such as yardmen and those who are engaged in the office.

116: The cost occasioning factors will as a rule be found to consist of those activities which require the employment of a personnel in the handling of a given number of animals. For instance, since each consignment, however large or small it may be, must be yarded, sold, weighed and accounted for as a separate unit, the greater the number of consignments contained in each hundred thousand of animals handled by a respondent firm the greater will be the personnel and resultant cost required for such handling. To a less degree the same is true with respect to the number of drafts and of owners and of account sales to the hundred thousand of animals handled. The accompanying table, considered in conjunction with the unit cost per firm of handling the various species of livestock according to modes of arrival, is an illustration of these facts. The accountants' analyses hereinafter described indicate that the greater unit costs attach to livestock coming in with species mixed in a car or in motor trucks or received as so-called "seconds" in the yard and the lesser unit costs attach to the livestock which

arrives in railroad cars without species being mixed. This table shows that in the case of cattle, for instance, those coming by straight rail, single ownership, average for the market as a whole 45 head per owner and 45 head per account sale, which is practically equivalent to per consignment, and 11 head per draft, whereas the mixed rail, single ownership, average only 33 head per owner and 30 head per account sale and approximately 2 head per draft; the drive-ins average 4 head per account sale and 4 head per owner and 2 head per draft; and the seconds average 8 head per account sale and 8 head per owner and less than 4 head per draft. The differences in unit costs hereinbefore discussed have occasioned classifications in rates based on the mode of arrival, but both the testimony of some of the respondents and the conclusions to be drawn from the analyses of the accountants lead to the further conclusion that costs do not depend upon the vehicle in which the livestock was transported to market or the company it kept on the road, but rather on the number of head contained in, the number of owners to, and the number of drafts necessary in each consignment. The table here discussed follows:

XVIII. Preparation for the Determination of Costs

117. In preparation for the determination of costs in this matter the Government caused to be made an audit of the business done by each respective respondent firm (including corporate and individual respondents) during the year 1929 and, when a re-hearing had been granted, caused to be made similar audits covering the year 1931. These audits were made by trained and experienced accountants, under the supervision of a chief accountant, from the books and records of the respondents. In each instance the year chosen was the last complete calendar year preceding the hearing. The marketing of livestock at Kansas City is such as to render the full calendar year the fairest accounting period. One, among other reasons for this, is that the calendar year presents a complete cycle of marketing of
85 the various classes and grades of livestock. The factors which may occasion light runs at one period of the year are apt to cause correspondingly heavy receipts at another.

118. While in preparation for each hearing it was only practicable to audit the business for one calendar year, much information concerning the conditions which affect respondents' businesses and covering a period of many years was obtained and placed in the record. Particularly among these was a showing of the volume of livestock received at the Kansas City stockyard year by year from 1882 to 1931, both inclusive, and month by month from January to September, both inclusive, of the year 1932.

119. In recognition of the fact that the rates prescribed will affect the respondent firms severally and not collectively, it is considered that the several experiences of more than 60 firms, occurring under conditions similar to those which may be expected to prevail when the

ates have gone into effect, is more pertinent than would be the experiences of one firm over a number of past years, the circumstances and conditions of many of which long ago have ceased to exist. The audits so prepared were accepted by the respondents as constituting true reflections of the facts disclosed by their books and records of account for the periods covered, though they contended that some items of cost incurred in their business were not shown on their books.

120. From those audits, the Government's chief accountant prepared for the year 1929 a functional cost analysis on a unit basis; that is to say, the audits and auxiliary data indicated the allocation directly to each species of livestock of a large percentage of the total cost incurred by each respondent firm. The remaining cost, which could not be allocated directly, was distributed by the accountant on what he considered appropriate bases.

121. He made a similar analysis covering the year 1931 and for that year also a further analysis, commonly called a "differential study," whereby he broke down the total cost per function and per species and distributed it over the various modes of arrival within each species for each particular firm, to the end that he might discover, for instance, how much it cost a particular firm to yard a hog arriving by motor truck as distinguished from the cost to the same firm for yarding a hog which came in by rail.

UNITED STATES VS. F. O. MORGAN

	Straight rail		Mixed—Cattle and calves		Mixed—All species		Drive-ins	Seconds	Buying		
	S. O.	P. O.	S. O.	P. O.	S. O.	P. O.			Rail	Drive-outs	
Cattle:	Cars	31, 231	6, 112	5, 954	3, 751	543	401	182, 764	105, 709	14, 275	24, 908
	Decks	31, 231	6, 112	5, 954	3, 751	543	401	182, 764	105, 709	14, 275	24, 908
	Head	867, 253	180, 598	197, 060	122, 531	17, 136	12, 958	89, 737	31, 789	49, 941	5, 953
	Drafts	72, 509	34, 309	45, 917	40, 661	5, 851	6, 527	45, 441	13, 624	10, 423	2, 365
	Owners	18, 865	10, 876	2, 630	8, 810	5, 506	2, 779	45, 441	13, 624	10, 423	2, 365
	Account Sales	18, 922	9, 950	2, 650	7, 284	509	2, 032	45, 441	13, 624	10, 423	2, 365
	Head per Draft	11, 96	5, 28	4, 29	3, 01	2, 93	1, 98	2, 04	3, 33	4, 18	10, 53
	Head per Owner	45, 97	16, 60	74, 93	13, 91	33, 36	4, 66	4, 02	7, 76	47, 11	10, 53
	Head per Account Sale	45, 81	18, 15	74, 37	16, 82	33, 67	6, 38	4, 02	7, 76	47, 11	10, 53
	Calves:										
Hogs:	Cars	244	23	1, 168	592	106	87	98, 911	14, 987	471	4, 319
	Decks	248	23	1, 168	592	106	87	98, 911	14, 987	471	4, 319
	Head	14, 035	1, 228	73, 170	36, 004	6, 885	5, 894	41, 010	1, 288	28, 726	3, 403
	Drafts	14, 035	1, 228	73, 170	36, 004	6, 885	5, 894	41, 010	1, 288	28, 726	3, 403
	Owners	751	30	16, 421	12, 120	3, 119	5, 546	41, 010	1, 288	28, 726	3, 403
	Account Sales	151	26	2, 573	4, 770	294	2, 110	41, 010	1, 288	28, 726	3, 403
	Head per Draft	22, 52	14, 79	2, 591	4, 199	295	1, 311	41, 010	1, 288	28, 726	3, 403
	Head per Owner	92, 85	40, 93	4, 74	3, 02	2, 21	1, 66	1, 51	83	20, 92	2, 94
	Head per Gunner	92, 85	40, 93	28, 43	7, 67	23, 42	2, 79	2, 41	7, 55	67, 91	10, 72
	Head per Account Sale	92, 95	47, 23	28, 35	8, 91	23, 34	4, 50	2, 41	7, 55	67, 91	10, 72
Sheep:	Cars	3, 145	1, 119	748	634	748	634	678, 156	84, 673	473	23, 326
	Decks	3, 205	1, 159	750	647	750	647	678, 156	84, 673	473	23, 326
	Head	235, 335	83, 875	55, 671	40, 388	55, 671	40, 388	59, 095	5, 842	65, 579	5, 994
	Drafts	12, 849	9, 328	6, 007	8, 476	6, 007	8, 476	59, 587	3, 710	407	489
	Owners	3, 067	5, 488	5, 929	5, 123	5, 929	5, 123	59, 587	3, 710	407	489
	Account Sales	3, 065	4, 969	5, 931	4, 072	5, 931	4, 072	59, 587	3, 710	407	489
	Head per Draft	18, 32	8, 99	5, 26	5, 83	5, 26	5, 83	7, 31	14, 49	41, 90	23, 67
	Head per Owner	78, 26	15, 28	105, 24	9, 64	11, 38	22, 82	11, 38	22, 82	161, 12	48, 11
	Head per Account Sale	78, 28	16, 87	104, 84	12, 13	104, 84	12, 13	11, 38	22, 82	161, 12	48, 11
	Calves:										
Hogs:	Cars	5, 481	820	48	23	48	23	243, 474	2, 154	455	8, 906
	Decks	10, 481	1, 491	49	24	49	24	243, 474	2, 154	455	8, 906
	Head	1, 871, 805	192, 452	6, 481	3, 399	6, 481	3, 399	29, 674	2, 112	870	345
	Drafts	10, 680	3, 699	4, 479	3, 374	4, 479	3, 374	16, 635	68	372	229
	Owners	3, 225	2, 243	59	205	59	205	16, 635	68	372	229
	Account Sales	3, 221	1, 627	59	133	59	133	16, 635	68	372	229
	Head per Draft	128, 44	40, 95	13, 53	9, 09	13, 53	9, 09	8, 20	19, 23	128, 37	229, 81
	Head per Owner	425, 37	83, 30	109, 84	16, 58	109, 84	16, 58	14, 64	31, 67	304, 66	229, 81
	Head per Account Sale	425, 89	118, 28	109, 84	25, 55	109, 84	25, 55	14, 64	31, 67	304, 66	229, 81

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122. In preparation for both the first and the second hearing the great majority of the respondents employed a trained and experienced accountant who prepared for each of the years 1929 and analyses similar in purpose to those above described as having made by the Government accountant, and based them on the audits. At the first hearing the accountants for the Government for the respondents, respectively, were in disagreement as to the to be used in making indirect allocations or distributions of such as administrative and general expenses, but at the second hearing respondents' accountant, while not endorsing the bases employed by the Government's accountant, did not regard it as worth to controvert them.

XIX. Items Entering Into Costs

3. Each of the accountants, in making his analysis of the business of the respondents, established a classification of expenses and assigned to it certain items. The classifications are as follows:

Government Accountant:	Respondents' Accountant:
Salaries and Wages.	Salaries and Wages.
Selling and Buying.	Selling and Buying.
Yarding.	Yarding.
Business Getting and Maintaining.	Business Getting and Maintaining.
Office.	Office.
General Supervision.	General Supervision.
Expenses.	Expenses.
Yarding.	Yarding.
Selling and Buying (Horse Expenses).	Selling and Buying (Horse Expenses).
Office.	Office.
Business Getting and Maintaining.	Business Getting and Maintaining.
Administrative and General Risk.	Administrative and General Risk.
Commissions paid (Split Com.)	Commissions paid (Split Com.)
Interest on Following Capital.	Interest on Following Capital.
Fixed Assets (including Exchange memberships).	Fixed Assets (including Exchange memberships).
Working Capital to cover:	Working Capital to cover:
Operating Expenses.	Operating Expenses and Handling Sales and Purchases.

4. It will be observed that with respect to the items of cost, distinguished from the method of arriving at the amounts of items, the two accountants were in substantial agreement, but that respondents' accountant includes an item for interest on working capital necessary to handle sales and purchases, and also includes an item of interest on capital invested in methods and practices. Neither of these items is covered by the classification by the Government accountant. Hereinafter, in determining allowable costs, an allowance is made to cover each and every item not to the classifications of the two accountants; also, similarly, an allowance is made to cover interest on working capital necessary for handling sales and purchases. The methods and practices, the

item, "Commissions paid (Split Commissions)," is included by the Government accountant as a part of the item "Selling and Buying Salaries."

value of which is contended for by respondents as an element of capital, are classified by their accountant under three heads, namely, (1) mailing lists and customer records; (2) office methods, systems, etc., and (3) yard methods and practices.

125. The mailing lists and customer records comprise principally all the names and addresses of those who have patronized and are believed to be still in position to patronize the respective respondent firms who keep the lists. To a lesser extent they contain some names and addresses of those who have not yet patronized the firm keeping the list. These data are acquired and recorded as a part of the normal and usual conduct of respondents' businesses. They are kept on a card or some similar form of record. Such records constitute a part

of the property of the respective respondents who keep them. 89 Therefore, their respective values, such as they may hereafter be found to be, are included as a part of respondents' invested capital.

126. The other matters listed as methods and practices constitute those common day by day routines used in the conduct of respondents' businesses, such, for instance, as the methods of yarding, sorting, selling, and weighing livestock in the yard and the practices of making out and transmitting account of sales to the patrons, remitting the proceeds of sale, and keeping records and other similar matters in the office. Respondents' theory is that if no such routines had been used by any one anywhere and respondents were compelled to employ persons to work them out, costs would be incurred in the discovery of them and further costs in the learning of them by respondents and their employees. Their accountant has arrived at some \$66,000 as the total of such costs. These are apportioned among the various firms as representatives. The respondents contend that the amounts apportioned to their respective firms should be regarded for rate making purposes as a part of the capital of such firms, interest on which, they say, should be included in the reasonable costs.

127. These items, namely, value of office methods and customs and value of yard methods and practices are not included in respondents' capital, a return of which is coverable into reasonable rates. The reasons for not including them are as follows:

128. They, like the common routines of everyday life generally, while very useful and practically indispensable, are not the property of anyone. They freely may be adopted and used by any who care to do so without the payment of any price or remuneration to any of the respondents in this proceeding. Knowledge of them is a part of the qualifications of respondents' various classes of workers, whether they be owners or employees. They are, in general, learned while the worker is engaged upon and performing other duties for which he is being adequately compensated. When, hereinafter, an allowance is made to cover the salaries of yardmen, salesmen, office workers, etc., it is not contemplated that it would be just or reasonable to cover into the rates such salaries to be paid to men who were

not acquainted with the common routines necessary in the performance of their work.

90 XX. Reasonable Unit Costs Plus Reasonable Unit Profits to be Covered Into Reasonable Commission Rates

129. There are more firms and a larger personnel on the Kansas City market than are necessary to dispose of shippers' livestock effectively. A smaller number of firms than are now engaged could handle the business more economically. The Packers and Stockyards Act does not clothe the Secretary of Agriculture with authority to determine how many firms would be required to handle the business properly or what specific firms should be engaged in business or whether some firms are unwisely continuing in business. The Act directs him to prescribe reasonable rates. In order to do this some reasonable standard must be adopted. That adopted herein has already been stated in paragraph 114. In applying this standard it is necessary for the rate maker to inform himself with respect to whether each of the respondent firms is conducting its business economically to the end that the schedule of rates prescribed may not pass unnecessary expenses on to those who pay the rates.

130. Commission rate making is a matter of the exercise of well-informed judgment, guided by mathematical calculation. The importance of statistics and cost of operation of each of the respondents lies in the fact that they are a guide to judgment. In arriving at a reasonable allowance to cover the cost of separate functions, the experience of each firm is considered separately. The use of the mathematical average cost of all firms doing business, as a test of reasonableness of rates would carry into the rates, through the aggregate used in arriving at the average, all the unreasonable and extravagant expenditures, if any, incurred under the rates already in existence. Moreover, the unit costs of many of the firms are high because the volume of business coming to the market is divided among too many firms and handled by an unnecessarily large personnel. To consider as reasonable the average of the unit costs so incurred would compel the maintenance, at the expense of the rate payer, of all who wish to engage in the business, even though the volume of business they can command be too small to warrant the organization necessary to handle it. In this connection, it is to be observed that while, for example, one salesman may be able to sell 30,000 head of cattle received by one firm, yet if the same volume be divided between two firms, two salesmen will be required. As a test of the reasonableness of rates, the adoption of the lowest costs incurred by the most economically conducted firm would result in a schedule so low as manifestly to be unreasonable as to some firms of normal efficiency. The adoption of the highest costs incurred by the least efficiently managed firms would result in a schedule so high as to be unfair to all shippers of livestock. This same situation obtains with respect to any functional item of expense incurred by any one firm.

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Since neither the average unit cost of all firms nor the experience of the most efficient firms, nor that of the most inefficient firms, can be taken as a guide to the establishment of rates, some other method of analysis must be adopted.

131. In general, the expenses incurred by commission firms fall into two classes: first, those which the conditions of the business tend to hold down, and, second, those which the conditions tend to increase. In arriving at a reasonable cost to be covered into rates in the case of those functions, the expenses of which are automatically held down, the costs as actually incurred by each of the firms should be considered and the reasonable cost arrived at, giving due consideration to the circumstances under which each of the respondents operates. In case of those costs which the conditions of the business tend to increase, such as the cost of salesmanship and the cost of advertising, expenses as actually incurred by any firm or by all of the firms do not furnish an adequate guide to the reasonableness of such cost. In arriving at a reasonable unit cost on account of these functions some additional procedure of approach has to be adopted. That used is discussed hereinafter in those paragraphs wherein the reasonable allowance is determined. The various functional unit items of cost, the findings as to the reasonable allowance for the various functions and the reasoning employed in arriving at the findings are set forth in the following paragraphs.

Salesmanship

132. An important item to be included in reasonable unit costs is a reasonable amount for salesmanship. This function is performed on the Kansas City market by owners of market agencies and by salesmen employed by them on a salary basis. Each of the accountants found unit costs of this item per species of livestock and also according to the respective modes of arrival.

133. Inasmuch as the selling and buying of livestock requires greater skill and judgment than the performance of any other of respondent's functional activities, with the possible exception of management, the proportion of owners as distinguished from employees engaged in this activity is great. In some firms such owners agreed upon salaries which should be set up on the books for each and paid, if the net result of operations made it possible so to do. In others the owners had merely drawing accounts with division of net owner incomes at the end of a year or some other accounting period. In still others the owners merely divided whatever net owner income happened to arise from the operation. By "net owner income" is meant moneys arising from the operation of the business and available for the personal use of the respective owners, regardless of whether it be considered as compensation for services rendered or profits arising from the ownership of the business or a combination of the two.

134. While the accountant for the Government used, in ascertaining the unit costs of salesmanship, the salaries, drawing accounts and

profits of owner salesmen, as well as the salaries of those who were employed, he neither attempted to pass upon the reasonableness of such salaries, drawing accounts or profits of the owner-salesmen nor recommended the inclusion of those of the owners in the costs which are to be used as the basis of reasonable rates. In this proceeding it is not contended by anyone that these owner salaries, drawing accounts or profits should be used as an element of costs. When, however, they are eliminated, and nothing substituted, it causes the salesmanship costs of so many firms to appear extremely low or be absent altogether that no fair normal can be garnered from the unit costs of the remaining firms for this item. In these circumstances the question becomes one of determining the amounts to be substituted. The record in this proceeding suggests alternative methods. Respondents contend that there should be substituted an amount representing the personal value of each owner-worker as appraised by a committee selected by respondents. Government counsel argue that 93 the unit costs of salesmanship should be ascertained by relating a reasonable annual salary for a salesman to a reasonable year's performance expressed in terms of the units sold, that is, carloads or head, as the case may be, as was done in Docket 143, the Omaha commission rate case (See Tagg Bros. and Moorhead v. U. S. 280 U. S. 420), and in every commission rate order issued by the Secretary of Agriculture since that time.

135. In preparation for a hearing in 1929, and again prior to that of 1931, respondents had an appraisal of the owner-workers made by a committee. The committee which made the appraisal in 1929 consisted of six members, and that making the one of 1931 of eight members. These committees had before them the following classes of information: enterprise with which connected; office held or position occupied; number of active co-partners; proportion of personal time involved; manner in which such time employed and proportion devoted to various activities; term of experience in livestock commission business; term of experience in livestock industry; commissions earned by the enterprise; cash value of sales and purchases made to earn such commissions; and, the number of head of livestock handled by species and in total. These committees did not possess any peculiar qualifications for making this appraisal. Even if the appraisal of services such as these could be considered as a matter determinable by expert opinion, any generally well informed citizen with the information at his disposal which the committees had before them could make an equally trustworthy appraisal. But the rejection of the appraisal method rests upon a further and more fundamental ground in that this method seeks to place upon each responder, worker, by name, an annual value based upon such record of his past performance as was before the committee and above which it is unreasonable for him to earn, regardless of his future accomplishments and below which it is unreasonable to expect him to serve, regardless of the small amount of service he renders. This would seem to be a clear-cut example of the wage

fixing condemned in *Wolff Packing Co. v. Industrial Court*, 262 U. S. 522. As contrasted with this, the performance method urged by Government counsel places no limit, either by way of maximum or minimum, upon the amount of annual compensation which reasonably an owner-salesman may earn. It finds a reasonable compensation to the respondents for the performance of a unit of salesmanship, whether it be done by owner or employee, and leaves the firm in position to expand or contract its reasonable income as it proves successful or unsuccessful in multiplying the units of salesmanship performed. To illustrate, if a fair annual salary be taken as \$4,000 and a reasonable full year's performance as the sale of 29,000 head of cattle, then the reasonable allowance for salesmanship will be 13.79 cents per head and the owner who is able to sell 35,000 head will be entitled to a compensation of \$4,826.50, while one who succeeds in selling only 20,000 head will be entitled only to \$2,758.

136. The record in this case contains all the information which the committees had before them and in addition many other facts pertinent to the determination of the cost of such services as are performed by owners, among which are the prices at which services such as those rendered by the owners are being bought and sold for on an open, competitive market. Such prices are the test generally regarded as proper measures. The record contains some facts which furnish a partial test of the appraisals. Some of the owners whose services in their respective business were appraised by the committee in 1929 later became employees on a salary basis at figures much below those at which their services were appraised. One such owner, a cattle salesman, whose services were appraised by the committee at \$4,000 in 1929 was receiving in 1932 a salary of \$1,700. Another cattle salesman whose services were appraised at \$3,000 in 1929 was receiving a salary in 1932 of \$1,800. In another case a hog salesman whose services were appraised at \$2,500 in 1929 was employed as a cattle yardman in 1932 at a salary of \$875.

137. The evidence shows that an important element influencing the value placed by these committees upon the services of owners was the business drawing power of the owners. These appraisals include also elements on account of risk bearing and executive functions exercised by the owners. All these elements are considered elsewhere and a reasonable allowance made for them in the determination of reasonable unit costs.

138. Since neither owners' salaries, as set up on the books, nor the appraised value of owners' services can be accepted as determinative of the unit costs of salesmanship, some other method must be adopted. That here used is the ascertainment of what the salesman's services are selling for and relating these to what, according to the record, constitutes a reasonable year's work. The salesmanship to be provided for in this order contemplates that it will be of high character, whether performed by

owners or by salesmen employed by them. The shipper is entitled to have his livestock sold by the most efficient and competent salesmen available on the market. Such salesmen, whether owners or employees, are entitled to receive a fair reward for their ability and services. An owner, while entitled to reasonable remuneration for management and the assumption of risk, which are ordinarily referred to as profit, is not entitled merely because he is an owner to more for the act of selling livestock than it would cost to get some other equally efficient salesman to perform the selling service for him.

139. The record contains the number of employed salesmen on the yards in 1929 and in 1931, together with the salaries they drew. There were in 1929, 122 employed cattle salesmen, 42 employed hog salesmen, and 11 employed sheep salesmen on the Kansas City market. In 1931 there were 133 employed cattle salesmen, 46 employed hog salesmen, and 14 employed sheep salesmen. The following table shows the salary range the number of salesmen of the various species in the two years and the salary grades into which they fall:

	1929	1931
no. receiving:		
\$6,000 or more	6	4
5,000 to 6,000	3	5
4,000 to 5,000	13	9
3,000 to 4,000	38	32
2,000 to 3,000	30	50
Less than 2,000	32	33
Total	122	133

HOG SALESMEN

	1929	1931
no. receiving:		
\$9,300	1	none
8,800	none	1
8,800	none	1
9,095	2	1
4,000 to 5,000	10	4
3,000 to 4,000	16	20
2,000 to 3,000	13	19
Under 2,000		
Total	42	46

SHEEP SALESMEN

	1929	1931
no. receiving:		
\$7,000	1	1
4,970	1	none
4,887	none	1
4,800	1	none
3,000 to 4,000	4	2
2,000 to 3,000	3	6
Under 2,000	1	4
Total	11	14

In order to earn these salaries the employed salesmen performed actual selling and handling livestock in the yards, and spent time in the country doing appraisal and publicity work. The record does not show for employed salesmen the amount of work done by any individual. The average number of head per salesman sold during

the course of the year by the salesman of a firm does not furnish a measure of the ability or the capacity of any individual salesman. The record contains opinions of salesmen as to what they consider a reasonable year's work on the Kansas City market where there are seasonable variations in the receipts of livestock and where the days of heaviest receipts come during the early part of the week.

140. A salesman employed by one of the respondents testified that a good salesman should sell 1,500 cars of cattle in a year. Another witness employed by a respondent stated that a good salesman can sell *well* as much as 2,000 cars per year. Another, a respondent, stated that a butcher salesman could sell 1,600 cars of butcher stuff in a year, and should be able to sell that many cars of steers. He stated also that a hog salesman should sell more than 1,600 cars of hogs, and that a sheep salesman should sell from 1,500 to 2,000 cars of sheep. On one day during the first hearing a salesman who is a member of one of the respondent firms sold about 30 cars of cattle, most of which had been carried over from the previous day on account of an unsatisfactory market. It is the opinion of some of the salesmen that they could sell more livestock than they do sell if they had the opportunity to exercise fully their selling ability.

141. The number of animals per straight car received by the various respondents varies somewhat according to the character of the business done, but the normal and usual number of head of cattle contained in a straight car is approximately 28 head, calves 57 head, hogs 75 head, and sheep 250 head.

142. Giving due consideration to the conditions under which salesmanship is performed on the Kansas City market, the volume of livestock handled by the respective firms and the estimates of salesmen as to what constitutes a reasonable year's work, it would be reasonable to expect a good and experienced salesman to sell in a year from 27,000 to 32,000 head of animals of the bovine species as they arrive at the Kansas City stockyards in the year 1931; a hog salesman from 75,000 to 100,000 head of hogs in a year; and a sheep salesman from 240,000 to 275,000 head of sheep.

143. If the selling of 29,000 head of cattle and calves, which is below the estimate of any witness as to what constitutes a reasonable year's work, be taken as the work to be done in order to earn a salary of \$4,000, which is in the high salary range being paid salesmen on the Kansas City market, the reasonable cost to the shipper on account of the function of salesmanship is 13.79 cents per head. Likewise, if the selling of 85,000 head of hogs be considered a reasonable year's work, and \$3,000, which is in the high salary range, be taken to be a corresponding remuneration, the salesmanship cost to the shipper on account of hogs is approximately 3.529 cents per head. If the selling of 250,000 head of sheep be considered to be a year's work for which a \$3,500 a year salary is compensatory, the reasonable per head cost to the shipper for salesmanship on account of sheep is 1.4 cents per head. On the basis of all the facts in the record it is found that the follow-

constitute reasonable per head costs to be covered into rates on account of salesmanship:

Cattle and Calves	\$0.1979
Hogs	.0353
Sheep	.0140

Yarding Salaries

44. The handling of livestock in the yard occasions expenses on account of salaries paid to those who do the yarding. The amount for the Government allocated yarding salaries direct to species. The per head cost of yarding salaries on account of each species, irrespective of mode of arrival, is shown in the following tables:

CATTLE AND CALVES

Firm No.	No. of head	Yarding salaries	Firm No.	No. of head	Yarding salaries
	3,656	\$0.0064	16	26,673	\$0.0699
	52,225	.0129	14	42,094	.0706
	454	.0140	12	67,947	.0711
	11,360	.0278	26	30,383	.0719
	122,107	.0279	65	40,303	.0720
	14,983	.0311	63	128,888	.0721
	3,113	.0388	75	25,113	.0746
	901	.0395	10	119,514	.0751
	61,658	.0400	52	164,890	.0754
	23,436	.0425	30	32,330	.0811
	185,312	.0481	71	62,038	.0818
	10,731	.0489	6	15,841	.0830
	2,122	.0490	25	53,512	.0840
	28,558	.0496	51	22,495	.0849
	38,997	.0517	29	25,581	.0880
	79,012	.0531	4	35,763	.0895
	34,058	.0535	82	110,419	.1015
	67,492	.0565	36	86,051	.1033
	19,205	.0584	84	67,609	.1044
	157,432	.0619	19	12,570	.1112
	8,750	.0621	78	10,819	.1206
	21,690	.0642	72	2,397	.1295
	59,107	.0650	77	23,436	.1296
	42,359	.0665	13	63,945	.1295
	31,539	.0668	7	15,790	.1353
	61,113	.0676	17	11,336	.1389
	34,942	.0682	76	9,619	.1635
	1,472	.0695	11	1,878	.2130

HOGS

	30,135	.0959	10	96,611	.0305
	12,619	.0060	4	9,552	.0309
	6,015	.0081	46	33,474	.0316
	16,312	.0112	37	35	.0329
	4,738	.0136	26	20,321	.0332
	737	.0151	79	2,969	.0355
	13,628	.0185	75	5,734	.0358
	5,952	.0185	16	8,498	.0357
	70,554	.0196	36	147,922	.0364
	6,196	.0197	7	41,090	.0366
	11,653	.0207	51	159,184	.0367
	2,364	.0207	30	3,489	.0395
	10,192	.0218	12	28,132	.0400
	9,679	.0222	35	12,017	.0421
	399	.0228	13	40,816	.0439
	8,168	.0228	73	34,425	.0507
	11,442	.0230	15	20,743	.0599
	3,727	.0235	9	19,051	.0601
	8,629	.0263	54	27,122	.0632
	150,806	.0263	25	19,201	.0641
	20,323	.0267	11	2,880	.0710
	15,810	.0284	60	21,164	.0721
	4,078	.0287	55	21,227	.0760
	8,191	.0290	14	27,819	.1112
	7,619	.0299	53	18,764	.1211
	6,872	.0300			

Firm No.	No. of head	Yarding salaries	Firm No.	No. of head	Yarding salaries
43	140,481	\$0.0030	1	43,274	\$0.0081
54	591,028	.0084	5	209,208	.0066
35	44,036	.0041	87	96,975	.0063
63	43,330	.0051	59	205,441	.0067
36	36,575	.0065	61	991	.0105
44	267,391	.0078	10	94,843	.0156

On the basis of the foregoing and of the general information contained in the record, it is found that the reasonable and normal costs to be covered into rates on account of yarding salaries are as follows:

\$.075 per head as to cattle and calves.

.030 " " " " hogs.

.008 " " " " sheep.

Yarding Expenses

145. The per head cost of yarding expenses on account of each species is as follows:

CATTLE AND CALVES

Firm No.	No. of head	Yarding expenses	Firm No.	No. of head	Yarding expenses
61	10,731	\$0.0003	20	32,320	\$0.0110
37	2,122	.0009	84	67,609	.0114
6	15,841	.0014	77	29,436	.0116
15	14,983	.0026	55	61,113	.0116
78	10,819	.0028	53	28,558	.0121
10	29,673	.0040	17	11,336	.0124
34	52,225	.0045	10	119,514	.0125
88	2,897	.0051	26	30,383	.0127
30	23,436	.0054	36	86,051	.0128
33	1,479	.0054	18	59,107	.0129
56	34,058	.0075	51	22,495	.0133
54	185,312	.0078	25	53,312	.0135
82	110,449	.0080	14	42,094	.0143
13	63,945	.0082	83	122,107	.0146
75	25,113	.0082	29	25,581	.0150
7	15,790	.0084	52	21,690	.0151
46	157,432	.0084	48	42,359	.0154
70	38,967	.0090	23	34,942	.0158
12	67,947	.0093	42	67,492	.0159
65	40,303	.0095	71	8,750	.0169
4	35,763	.0096	63	128,858	.0172
39	61,658	.0100	30	19,205	.0173
62	31,539	.0103	71	62,038	.0181
73	79,012	.0104	19	12,570	.0202
59	164,860	.0105			

14	27,819	.0061	10	96,653	.0004
48	5,952	.0061	52	6,196	.0005
54	27,122	.0101	25	19,201	.0006
61	9,679	.0061	35	12,017	.0006
83	4,078	.0061	77	10,192	.0006
36	147,922	.0061	78	4,738	.0006
4	9,552	.0062	62	15,810	.0007
6	8,168	.0062	73	34,425	.0007
7	41,090	.0062	15	20,743	.0009
18	11,653	.0062	75	5,134	.0010
34	16,312	.0062	79	2,969	.0010
55	21,227	.0062	26	20,321	.0010
59	70,554	.0062	30	3,489	.0011
63	150,806	.0062	71	20,323	.0012
46	33,474	.0063	29	12,619	.0012
82	30,135	.0063	23	1,536	.0013
13	40,816	.0064	42	11,442	.0014
20	3,722	.0064	17	5,872	.0015
51	159,184	.0064	88	249	.0045
53	18,764	.0064	65	7,619	.0088
60	21,164	.0064			

SHEEP

Firm No.	No. of head	Yarding expenses	Firm No.	No. of head	Yarding expenses
18	3,157	\$0.0001	60	753	\$0.0003
46	7,795	.0001	82	2,007	.0003
63	43,330	.0001	53	733	.0005
73	4,035	.0001	75	2,487	.0005
36	36,575	.0001	77	1,635	.0005
13	5,688	.0002	78	3,432	.0005
35	44,036	.0002	15	3,854	.0006
53	3,685	.0002	17	756	.0006
83	2,380	.0002	26	2,657	.0007
6	1,220	.0003	29	734	.0007
20	872	.0003	71	1,414	.0011
25	3,676	.0003	30	533	.0046
81	6,942	.0003	42	1,460	.0130
52	4,320	.0003	65	2,184	.0131

On the basis of the foregoing and of the general information contained in the record, it is found that the reasonable and normal costs to be covered into rates on account of yarding expenses are as follows:

\$.014 per head as to cattle and calves.

.0060 " " " " hogs.

.0004 " " " " sheep.

Office Salaries

146. The per head cost on account of office salaries allocated to each of the species is as follows:

101 CATTLE AND CALVES

Firm No.	Number of head	Office salaries	Firm No.	Number of head	Office salaries
6	15,841	\$0.0010	46	157,432	\$0.0550
17	11,336	.0143	54	185,312	.0558
63	122,107	.0203	75	25,113	.0467
71	62,038	.0206	76	9,619	.0570
14	42,094	.0217	73	8,012	.0575
34	52,225	.0239	20	32,320	.0628
35	61,658	.0240	52	21,690	.0629
42	67,492	.0256	7	15,790	.0631
53	28,558	.0330	78	10,819	.0656
13	63,945	.0382	61	10,731	.0692
63	128,888	.0567	23	34,942	.0693
82	110,449	.0373	29	25,581	.0707
10	119,514	.0396	70	58,967	.0730
62	31,539	.0396	25	53,312	.0734
30	23,436	.0414	56	34,058	.0810
55	61,113	.0441	65	40,303	.0879
77	23,436	.0442	74	8,750	.1002
26	30,383	.0447	51	22,495	.1150
60	19,205	.0449	19	12,570	.1192
12	67,947	.0450	11	1,878	.1195
59	164,860	.0158	33	1,479	.1385
18	59,107	.0490	9	3,113	.1472
79	11,360	.0184	37	2,122	.1567
48	42,356	.0452	69	3,656	.1629
36	86,051	.0518	72	2,397	.1794
4	33,763	.0525	67	454	.1821
15	14,983	.0529	85	2,897	.1955
34	67,609	.0534	87	991	.2117
16	25,673	.0544			

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HOGS

Firm No.	Number of head	Office salaries	Firm No.	Number of head	Office salaries
6.	8,168	\$0.0004	10.	96,653	\$0.0013
17.	8,872	.0076	52.	6,196	.0019
34.	16,312	.0115	78.	4,738	.0022
14.	27,819	.0117	70.	13,628	.0036
61.	9,679	.0146	50.	70,554	.0029
53.	20,323	.0152	67.	6,015	.0025
42.	18,764	.0181	12.	28,132	.0084
63.	11,442	.0189	65.	7,619	.0036
77.	150,806	.0194	11.	2,990	.0035
13.	10,192	.0195	20.	3,727	.0103
79.	40,816	.0198	46.	33,474	.0123
15.	2,969	.0209	16.	8,498	.0451
35.	20,743	.0210	75.	5,134	.0363
51.	12,017	.0214	23.	1,536	.0505
73.	159,184	.0229	30.	3,489	.0518
4.	34,425	.0231	33.	1,690	.0537
76.	9,552	.0232	84.	11,944	.0553
7.	8,629	.0232	19.	4,497	.0579
60.	41,090	.0233	9.	19,051	.0585
55.	21,161	.0238	25.	19,201	.0604
18.	21,227	.0253	83.	4,078	.0614
36.	11,653	.0259	74.	2,364	.0687
62.	147,922	.0262	37.	-35	.0874
82.	15,810	.0266	56.	8,191	.0933
48.	30,135	.0270	72.	1,077	.0970
26.	5,952	.0278	87.	399	.1030
29.	20,321	.0292	66.	737	.1450
54.	12,619	.0300	88.	249	.2105
	27,122	.0514			

102

SHEEP

6.	1,220	\$0.0005	52.	4,320	.0189
17.	43,274	.0013	36.	36,575	.0191
59.	756	.0042	51.	6,942	.0194
44.	205,441	.0044	65.	2,184	.0195
54.	267,391	.0055	16.	1,570	.0199
54.	591,028	.0059	23.	862	.0201
35.	150,283	.0067	55.	3,685	.0204
14.	44,036	.0068	12.	3,439	.0206
79.	7,365	.0071	62.	3,065	.0212
18.	2,273	.0074	7.	1,295	.0252
4.	3,157	.0078	46.	7,795	.0264
87.	1,896	.0095	78.	3,432	.0283
42.	96,975	.0102	60.	753	.0284
5.	140,481	.0105	82.	2,007	.0284
83.	209,208	.0108	20.	872	.0291
10.	2,380	.0110	25.	3,676	.0316
76.	94,843	.0113	34.	190	.0341
63.	1,553	.0115	70.	2,507	.0346
15.	43,330	.0131	29.	734	.0374
73.	3,854	.0135	67.	580	.0388
77.	4,035	.0135	48.	430	.0395
42.	1,635	.0149	19.	1,252	.0490
66.	1,460	.0158	11.	175	.0490
13.	4,924	.0158	74.	333	.0520
61.	5,688	.0162	35.	805	.0675
71.	991	.0165	30.	533	.0689
53.	1,414	.0172	37.	321	.0737
75.	733	.0173	9.	595	.0796
26.	2,487	.0181	66.	283	.1609
	2,657	.0185	72.	45	.1764

On the basis of the foregoing and of the general information contained in the record, it is found that the reasonable and normal costs to be covered into rates on account of office salaries are as follows:

\$.0525 per head as to cattle and calves.
 .0300 " " " " hogs.
 .0100 " " " " sheep.

Office Expenses

147. The per head cost on account of office expenses allocated to each of the species is as follows:

CATTLE AND CALVES

Firm No.	Number of head	Office expenses	Firm No.	Number of head	Office expenses
88	2,897	\$0.0016	26	30,383	\$0.0328
77	2,122	.0017	78	19,819	.0028
2	2,397	.0091	46	17,432	.0331
1	67,609	.0138	61	10,731	.0345
16	26,673	.0147	70	38,967	.0360
76	9,619	.0158	77	23,436	.0366
103	35,763	.0163	75	25,113	.0371
59	4,860	.0186	71	62,038	.0379
67	4,454	.0190	34	52,225	.0401
23	34,942	.0214	30	23,436	.0402
12	67,937	.021	15	14,983	.0411
54	185,312	.0216	73	79,012	.0419
7	15,790	.0222	35	61,658	.0429
18	59,107	.0232	62	31,589	.0430
41	67,492	.0236	6	15,881	.0434
83	122,107	.0236	82	110,449	.0443
36	86,051	.0238	60	19,205	.0447
42	21,690	.0251	19	12,570	.0455
56	34,058	.0269	79	11,360	.0456
33	1,479	.0272	14	42,094	.0458
65	40,303	.0279	20	32,320	.0461
10	119,514	.0290	13	63,945	.0493
45	42,359	.0291	11	1,878	.0538
17	11,336	.0292	74	8,750	.0543
63	128,888	.0292	29	25,581	.0546
53	28,558	.0301	51	22,495	.0573
25	53,312	.0302	87	991	.1042
55	61,113	.0313	9	3,113	.1947

HOGS

37	35	.0011	42	11,442	.0175
88	249	.0016	12	28,132	.0176
67	6,015	.0038	11	2,990	.0178
76	8,629	.0048	55	21,227	.0179
72	1,077	.0049	6	8,168	.0179
61	9,679	.0073	34	16,312	.0193
4	9,552	.0073	79	2,969	.0198
7	41,090	.0082	54	27,122	.0202
33	1,690	.0106	26	20,321	.0215
51	159,184	.0114	19	4,497	.0220
36	147,922	.0121	10	96,653	.0229
65	7,619	.0121	60	21,164	.0237
16	8,498	.0122	29	12,619	.0239
52	6,196	.0127	14	27,819	.0244
18	11,653	.0130	25	19,201	.0249
83	4,078	.0131	46	33,474	.0255
59	70,554	.0137	13	40,816	.0256
84	11,944	.0142	71	20,323	.0280
63	150,806	.0147	62	15,819	.0288
17	6,872	.0154	20	3,727	.0295
23	1,536	.0157	56	8,191	.0310
77	16,192	.0162	82	30,135	.0311
78	4,738	.0162	75	5,134	.0330
15	20,743	.0163	74	2,364	.0373
48	5,952	.0164	35	12,917	.0382
83	18,764	.0165	87	399	.0502
70	13,628	.0165	30	3,489	.0503
73	34,425	.0166	9	19,034	.0774

SHEEP

Firm No.	Number of head	Office expenses	Firm No.	Number of head	Office expenses
37	321	\$0.0008	77	1,635	\$0.0121
84	150,283	.0017	35	44,036	.0122
59	205,441	.0018	83	2,380	.0125
54	591,028	.0023	25	3,676	.0128
4	1,896	.0031	33	805	.0133
76	1,553	.0032	26	2,657	.0138
18	3,157	.0039	78	3,432	.0140
67	580	.041	55	3,685	.0147
43	140,481	.0042	14	7,365	.0147
57	96,975	.0050	42	1,460	.0149
8	200,208	.0053	46	7,795	.0150
56	4,924	.0053	53	733	.0161
16	1,570	.0055	19	1,252	.0171
44	257,391	.0055	70	2,597	.0173
65	2,184	.0062	1	43,274	.0181
23	862	.0063	6	1,220	.0211
79	2,273	.0070	13	5,688	.0213
52	4,320	.0076	11	175	.0217
17	766	.0082	48	430	.0218
61	991	.0082	20	872	.0223
10	94,843	.0083	62	3,065	.0234
7	1,295	.0086	60	753	.0275
76	1,553	.0089	74	333	.0275
72	45	.0091	29	734	.0280
51	6,942	.0096	71	1,414	.0314
73	4,035	.0097	82	2,007	.0323
12	3,439	.0099	34	190	.0574
63	43,330	.0099	30	533	.0671
15	3,854	.0103	9	598	.1039
75	2,487	.0118			

On the basis of the foregoing and of the general information contained in the record, it is found that the reasonable and normal costs to be covered into rates on account of office expenses are as follows:

\$.0300 per head as to cattle and calves.

.0175 " " " " hogs.

.0050 " " " " sheep.

Business Getting and Maintaining Expenses

148. The per head cost on account of business getting and maintaining expenses allocated to each of the species is as follows:

CATTLE AND CALVES

Firm No.	No. of head	Business getting and maintaining expenses	Firm No.	No. of head	Business getting and maintaining expenses
76	9,619	\$0.0058	16	26,673	\$0.5200
66	3,656	.0107	33	1,479	.0540
67	454	.0170	79	11,364	.0540
15	14,983	.0219	51	22,495	.0543
37	2,122	.0229	36	86,051	.0576
72	2,397	.0241	30	23,436	.0581
(105)	3,113	.0264	87	991	.0599
56	34,058	.0371	55	61,113	.0612
65	40,303	.0371	18	59,107	.0628
61	10,731	.0377	77	23,438	.0632
23	34,942	.0399	78	10,819	.0639
29	25,581	.0455	46	157,432	.0647
17	11,336	.0474	75	25,113	.0656
60	13,205	.0489	6	15,841	.0672
48	42,359	.0508	83	122,107	.0677
7	15,790	.0519	34	52,225	.0699

CATTLE AND CALVES—Continued

Firm No.	No. of head	Business getting and maintaining expenses	Firm No.	No. of head	Business getting and maintaining expenses
13	63,945	\$0.0714	54	185,312	\$0.0924
34	67,609	.0724	19	12,570	.0974
56	164,860	.0732	73	79,012	.1057
35	53,312	.0735	42	67,492	.1112
74	8,750	.0750	70	38,967	.1149
71	62,038	.0756	35	61,658	.1188
52	21,690	.0763	4	35,763	.1232
20	32,320	.0797	63	128,888	.1262
14	42,094	.0780	53	28,558	.1346
82	110,449	.0819	10	119,514	.1448
26	30,383	.0873	62	31,539	.1655
12	67,947	.0884	88	2,897	.2783

HOGS

(100) 76	8,629	.0022	30	3,480	.0265
66	737	.0060	7	41,090	.0267
67	6,015	.0082	83	4,078	.0268
9	19,051	.0082	34	16,312	.0272
72	1,077	.0104	75	5,134	.0277
15	20,743	.0106	25	19,201	.0292
20	3,727	.0130	6	8,168	.0302
56	8,191	.0142	54	27,122	.0302
37	35	.0157	23	1,536	.0309
48	5,952	.0161	46	33,474	.0321
61	9,679	.0161	71	20,323	.0324
65	7,619	.0163	19	4,497	.0327
39	70,554	.0164	13	40,816	.0344
87	399	.0184	55	21,227	.0340
29	12,619	.0191	74	2,364	.0344
78	4,738	.0191	4	9,552	.0353
16	8,498	.0235	52	6,196	.0373
60	6,872	.0238	12	28,132	.0393
17	21,164	.0238	107	30,135	.0394
36	147,922	.0238	63	150,806	.0410
33	1,690	.0240	26	20,321	.0421
79	2,960	.0251	73	34,425	.0467
18	11,653	.0252	53	18,764	.0490
84	11,944	.0255	10	96,653	.0535
51	159,184	.0259	42	11,442	.0544
70	13,628	.0260	35	12,017	.0546
14	27,819	.0261	82	15,810	.0773
77	10,192	.0262	88	249	.1834

SHEEP

76	1,553	.0017	83	2,380	.0199
69	283	.0055	29	734	.0204
56	4,924	.0058	12	3,439	.0206
15	3,854	.0066	44	267,391	.0208
67	580	.0070	25	3,676	.0211
84	150,283	.0081	33	805	.0216
20	872	.0091	108	753	.0217
73	4,035	.0092	70	2,507	.0219
65	2,184	.0093	51	6,942	.0229
87	96,975	.0094	59	205,441	.0234
72	45	.0104	14	7,365	.0236
18	3,157	.0111	7	1,295	.0238
9	598	.0111	30	533	.0241
1	43,274	.0116	10	94,843	.0246
16	1,570	.0129	63	5,688	.0248
55	3,685	.0131	19	1,252	.0254
48	430	.0140	52	4,320	.0262
54	591,028	.0140	71	1,414	.0263
79	2,273	.0141	35	44,036	.0269
37	321	.0142	74	333	.0273
75	2,487	.0155	6	1,220	.0279
23	862	.0158	63	43,330	.0283
4	1,896	.0163	82	2,007	.0305
46	7,795	.0173	26	2,657	.0317
17	786	.0181	43	140,481	.0323
36	36,575	.0181	53	733	.0353
5	209,208	.0194	42	1,460	.0399
61	991	.0195	34	190	.0429
77	1,635	.0195	62	3,065	.0651
78	3,432	.0199			

An amount reasonably necessary for business maintenance is an item properly coverable into a schedule of reasonable rates. Any expenditure above this amount directed toward increasing the volume of business should be recouped from the additional business obtained. Competition in the commission business is extremely keen and results in a race for getting business which does not manifest itself in a reduction of rates but consists largely in efforts by each market agency to take some of the business away from the other market agencies. Since the rates of most of the respondents are uniform, there is little inducement for the shipper to select one market agency in preference to another because of the rates charged. Business is attached in many cases by reason of ties of personal friendship; in other cases by the estimate of the character of services rendered. Each market agency holds its services out to be of the highest quality and endeavors to convince the shipper of this fact. Under these conditions the amount expended for business getting and maintaining is limited only by what can be afforded under the existing rates,

whatever they may be, and by such limits as the respondents impose upon themselves. If excessive expenditures on this account be covered into a rate schedule, every shipper pays to have himself persuaded to send his livestock to one commission firm rather than to another which presumably can serve him equally well. Moreover, as already pointed out, some of the expenditures incurred to get and hold business are covered in general expenditures and in the salaries of salesmen employed, in part at least, on account of the business which they control as well as on account of the salesmanship which they perform. On the basis of all the facts in the record it is found that the reasonable amount to be covered into rates and paid by the shipper on account of business getting and maintaining should not exceed 10 per cent of the total reasonable cost, and reasonable profit.

Administrative and General Expenses

149. The per head cost on account of administrative and general expenses, namely, telephone and telegraph, directors' fees, legal and auditing, taxes, meals, clearing house, general and miscellaneous, allocated to each of the species, is as follows:

CATTLE AND CALVES

Firm No.	Number of head	Administrative and general expenses	Firm No.	Number of head	Administrative and general expenses
67	454	\$0.0038	76	9,619	\$0.0213
72	2,397	.0039	75	25,113	.0220
86	3,656	.0039	65	40,303	.0224
37	2,122	.0091	20	32,320	.0229
17	11,336	.0101	26	30,383	.0229
56	34,058	.0138	16	26,673	.0230
61	10,731	.0141	12	67,947	.0241
9	3,113	.0142	13	63,945	.0244
14	42,004	.0164	110	25,581	.0245
15	14,983	.0182	30	23,436	.0247
11	1,878	.0187	6	15,841	.0250
62	31,539	.0188	52	21,690	.0258
71	62,038	.0209	19	12,570	.0261

CATTLE AND CALVES—Continued

Firm No.	Number of head	Administrative and general expenses	Firm No.	Number of head	Administrative and general expenses
34	52,225	\$0.0263	36	86,051	\$0.0351
34	23,436	0265	60	19,205	0356
46	157,432	0269	59	164,800	0362
54	185,312	0270	10	119,514	0389
25	53,312	0272	23	34,942	0400
42	67,492	0275	84	67,609	0405
46	42,359	0280	79	11,360	0411
7	15,790	0282	4	35,763	0448
33	1,479	0292	63	128,888	0454
55	61,113	0293	35	61,658	0499
70	38,967	0301	74	8,750	0539
18	59,107	0309	78	10,819	0580
82	110,449	0330	83	122,107	0714
51	22,495	0331	87	991	0775
53	28,558	0334	88	2,897	1156
73	79,012	0351			

HOGS

67	6,015	0008	51	159,184	0166
72	1,077	0021	55	21,227	0169
61	9,679	0030	18	11,653	0173
66	7,737	0036	79	2,909	0178
17	8,872	0054	36	147,922	0178
37	35	0054	53	18,764	0183
9	19,051	0057	60	21,164	0189
11	2,900	0062	16	8,498	0191
111	8,629	0064	12	28,132	0195
70	20,743	0072	75	5,134	0195
15	27,819	0089	4	9,552	0196
14	7,619	0097	42	11,442	0203
65	12,619	0104	46	33,474	0207
29	41,090	0105	25	19,201	0223
27	1,690	0114	63	150,806	0228
33	8,168	0116	82	30,135	0232
6	10,192	0117	54	27,122	0250
77	4,497	0126	59	70,554	0267
10	15,810	0126	78	4,738	0285
62	40,816	0127	23	1,536	0294
13	16,312	0127	10	96,653	0307
34	6,196	0130	30	3,489	0308
82	34,425	0133	74	2,364	0368
73	13,628	0139	87	150,806	0376
70	3,727	0147	83	4,078	0396
29	20,321	0155	84	11,944	0419
26	20,323	0155	35	12,017	0449
71	8,191	0159	88	249	1245
46	5,952	0163			

SHEEP

112					
67	560	0008	19	1,252	0098
56	4,924	0027	62	3,065	0102
54	591,028	0028	13	5,698	0105
17	756	0031	12	3,439	0110
61	991	0033	7	1,295	0110
59	205,441	0035	20	872	0111
87	66,975	0037	10	94,843	0111
43	140,481	0037	23	802	0118
66	283	0039	25	3,676	0120
72	48	0040	6	1,220	0122
76	1,553	0043	29	734	0125
46	7,795	0043	46	7,795	0129
37	321	0044	55	3,685	0131
15	3,854	0046	36	36,575	0131
65	2,184	0050	51	6,942	0139
5	206,208	0051	33	805	0142
84	150,283	0051	36	44,036	0143
18	3,157	0052	70	2,507	0145
14	7,365	0053	113	43,330	0154
79	2,273	0064	71	1,414	0174
75	2,487	0070	53	733	0179
11	175	0078	48	430	0210
52	4,320	0078	60	753	0219
73	4,035	0078	82	2,007	0241
9	598	0079	78	3,432	0250
16	1,570	0080	74	333	0280
4	1,896	0086	83	2,380	0377
77	1,635	0088	30	533	0411
1	43,274	0092	34	190	0418
26	2,657	0093	42	1,460	0519

On the basis of these facts and all the information contained in the record, it is found that the following are reasonable per head costs to be covered into rates on account of administrative expenses:

\$.0330 per head as to cattle and calves.

.0200 " " " " hogs.

.0050 " " " " sheep.

Insurance

150. Many of the risks incident to the conduct of the commission business are insurable; others are not. The expenses on account of premiums paid to carry insurable risks are costs properly coverable into a reasonable schedule of commission rates. Mortgage and theft, fire, and workmen's compensation insurance are the three types most generally carried by the respondents. The expenses on account of carrying these types of insurance are ascertainable and can be expressed in terms of per head costs in the case of each species. Mortgage and theft insurance premiums are quoted by insurance companies in standard cars defined as "25 head of cattle, 60 head of calves, 80 head of hogs, and 100 head of sheep." The rates are 10 cents per carload of livestock irrespective of species. This is \$.00357 per head for cattle; \$.00125 per head as to hogs; and \$.001 per head as to sheep.

151. Workmen's compensation insurance is optional in the states of Missouri and Kansas, in which the respondents conduct their business. Some of the respondents carry this type of insurance; others do not. Nevertheless, it is a legitimate cost to be provided for. A sufficient allowance should be made in the rates prescribed to enable each of the respondents either to carry this type of insurance or to set up a reserve against losses incurred. The cattle facilities of the stockyard company, where the majority of the respondents carry on their business, are located mainly in the State of Missouri, while the hog house is located in the State of Kansas. The auditor for the respondents segregated the expenses which he attributed to workmen's compensation on the basis of salaries paid in the State of Kansas and those paid in the State of Missouri. Premiums on account of this type of insurance are all on the basis of employee payroll. The yardwork payroll on account of hogs is occasioned largely in the State of Kansas, and the yardwork payroll on account of cattle and calves, and sheep is occasioned largely in the State of Missouri. The office payroll is occasioned jointly by all of the livestock handled. The auditor for the respondents attributed to all the firms represented by him \$993.07, premiums on account of workmen's compensation for yard workers, to the State of Kansas; \$7,048.27 to yard workers in Missouri; and \$93.47 to office workers. For all practical purposes he attributed \$993.07 to hogs; \$7,048.27 to cattle and calves, and sheep; and \$93.47 to cattle and calves, hogs and sheep. The two accountants were in practical agreement as to the amount necessary

to provide for insurance premiums. The accountant for the Government set up \$911.76 for all respondents for fire insurance premiums, and the accountant for the respondents who are members of the Exchange set up \$841.40.

152. In considering the reasonable per head expense on account of some other functions the experience of each firm has been gone into and the normal arrived at on the basis of the experience of each individual firm. The use of an average based upon an aggregate of the expenses of the firms under consideration has been condemned and the reason therefor given. In the case of expenses in which the amounts involved are so small, the consideration of the market as a whole or the consideration of the experience of each of the respondents would lead substantially to the same result. Because of this fact the figures for the market as a whole are used in arriving at the reasonable per head costs on account of insurance.

115 153. Premiums for workmen's compensation on account of cattle and calves, and sheep have been allocated to these species on the basis of the yard payroll occasioned by each. All premiums paid in the State of Kansas have been attributed to hogs. Office workmen's compensation premiums and fire insurance premiums are occasioned by all species. The sum of \$93.47, office workmen's compensation premiums, and \$841.40, fire insurance premiums, have been allocated to the various species on the basis of account sales and account purchases. These allocations result in attributing \$7.219 to cattle and calves; \$1.240 to hogs; and \$517 to sheep. The per head expenditure on this basis is \$0.0032 for cattle and calves; \$0.0012 for hogs; and \$0.0003 for sheep.

154. This results in a per head allowance on account of the types of insurance discussed herein of \$0.00677 per head for cattle and calves; \$0.00245 per head for hogs; and \$0.0013 per head for sheep.

Interest on Capital

155. A legitimate cost to be covered into rates and paid by shippers of livestock is a reasonable amount for interest on the capital necessary in the conduct of the commission business. Inasmuch as a separate allowance to cover the uninsurable risks and contingencies is hereafter provided for in profit, the reasonable rate of return herein found represents interest on the use of capital.

156. Three witnesses testified in the second hearing as to what constitutes a reasonable rate of return under the conditions above stated. Two of them were bankers called by the respondents and the third an economist called by the Government. One of the bankers and the economist are in substantial agreement. The economist, who testified first, gave it as his opinion that an allowance of 6 per cent interest on the value of the fixed assets would be reasonable and that a rate somewhere between 6 and 8 per cent on the amount of liquid working capital necessary in the business would be reasonable. One of the bankers called by the respondents gave it as his opinion that the Sec-

retary of Agriculture would act fairly in arriving at a rate of return if he based his conclusions upon this opinion. The other banker called by the respondents stated that, in his judgment, a reasonable rate of return would be 20 per cent. The inference to be drawn from his testimony, however, is that he had in mind an interest rate high enough not only to pay for the use of the capital but also to cover the risks incident to the business. The bank of which he is an official assesses charges against various of the respondents for the temporary overdrafts they make at his bank. The rates charged vary and depend, in part, upon the average amount of the deposits carried by them. He stated that the charge made by his bank to the respondents on these overdrafts would average around 7 per cent.

157. In determining the reasonable amount of capital to be considered in the case of each of the respondents, the amount as determined by the accountant for those respondents who are members of the Livestock Exchange has been considered. A segregation of capital has been made into fixed and working capital. Fixed capital has been taken to be the amount as determined by the accountant for the respondents represented by the following items, namely, furniture, fixtures, and equipment; materials and supplies; Exchange memberships; and mailing lists and customer records. On the value of these, interest at 6 per cent has been computed in the case of each firm. On the amount of working capital determined by the accountant for the respondents interest has been computed at 7 per cent. The sum of the interest on fixed assets and interest on working capital, expressed in cents per head, has been set up as to each firm.

158. The following tables set forth by firms the per head interest on account of selling, calculated on the basis stated above:

CATTLE AND CALVES

Firm No.	No. of head	Interest	Firm No.	No. of head	Interest
48	35,376	\$0.0022	30	27,615	\$0.0139
19	9,941	.0031	53	26,901	.0141
84	62,243	.0051	26	28,553	.0144
87	953	.0053	7	14,931	.0147
59	138,133	.0055	61	10,042	.0147
34	26,850	.0069	78	7,125	.0153
54	117,345	.0069	15	12,797	.0155
55	47,630	.0070	74	5,732	.0162
83	45,799	.0071	9	2,191	.0163
82	90,682	.0076	29	24,297	.0174
51	22,013	.0078	6	10,253	.0178
46	99,113	.0084	16	23,073	.0184
63	89,771	.0092	62	28,109	.0187
13	55,362	.0093	77	21,031	.0187
65	35,698	.0097	35	35,998	.0189
56	29,689	.0100	4	33,160	.0193
117	50,341	.0101	17	9,707	.0215
42	32,595	.0102	52	18,614	.0231
70	46,755	.0109	76	6,872	.0265
18	9,475	.0115	66	1,503	.0324
79	20,363	.0116	60	14,265	.0374
75	42,045	.0118	88	2,273	.0463
25	53,940	.0122	72	1,934	.0494
71	35,159	.0125	11	1,708	.0529
14	26,219	.0125	67	382	.0594
23	73,218	.0125	37	2,122	.0624
73	59,216	.0130	33	1,218	.0737
12	22,770	.0134			
30					

HOGS

Firm No.	No. of head	Interest	Firm No.	No. of head	Interest
61.....	8,501	\$0.0007	6.....	7,902	\$0.0051
19.....	3,008	.0009	16.....	8,425	.0051
50.....	64,906	.0016	23.....	1,536	.0055
51.....	156,853	.0017	4.....	9,171	.0055
53.....	20,575	.0020	62.....	13,594	.0056
54.....	23,261	.0021	15.....	20,406	.0059
46.....	32,905	.0025	17.....	6,258	.0063
56.....	7,899	.0027	35.....	11,773	.0067
63.....	116,670	.0027	52.....	6,193	.0071
74.....	13,427	.0028	76.....	7,986	.0078
31.....	11,223	.0028	87.....	226	.0078
13.....	40,786	.0028	82.....	29,780	.0081
15.....	11,358	.0029	84.....	9,880	.0086
42.....	11,015	.0031	73.....	18,729	.0086
65.....	7,610	.0032	66.....	737	.0103
71.....	20,141	.0036	60.....	19,875	.0107
48.....	5,893	.0036	78.....	3,260	.0111
25.....	18,661	.0036	79.....	2,969	.0126
20.....	3,727	.0039	77.....	9,507	.0129
14.....	27,771	.0039	72.....	1,045	.0134
12.....	27,121	.0039	11.....	2,990	.0150
53.....	18,759	.0041	75.....	4,922	.0174
7.....	37,426	.0043	67.....	6,931	.0177
26.....	20,075	.0044	74.....	2,364	.0185
9.....	17,642	.0045	33.....	1,690	.0215
29.....	12,428	.0048	83.....	3,292	.0634
30.....	3,489	.0048	88.....	422	.0942

SHEEP

19.....	741	.0003	12.....	2,480	.0028
31.....	6,196	.0007	7.....	1,295	.0031
50.....	191,587	.00076	73.....	3,770	.0031
44.....	248,022	.00084	16.....	359	.0033
54.....	565,861	.00096	77.....	1,532	.0034
53.....	2,947	.0012	17.....	439	.0037
13.....	5,687	.00137	4.....	1,583	.0038
56.....	4,924	.0014	76.....	1,356	.0038
63.....	24,716	.00144	84.....	105,847	.0039
5.....	205,880	.00145	66.....	283	.0044
61.....	638	.0016	78.....	3,432	.0046
70.....	2,484	.0016	1.....	42,372	.00492
46.....	7,002	.0017	53.....	805	.00493
57.....	93,327	.00175	20.....	511	.0052
15.....	3,805	.0018	82.....	1,927	.0052
65.....	1,284	.0018	75.....	2,487	.0062
18.....	2,732	.0020	79.....	2,337	.0062
25.....	3,067	.00212	53.....	534	.0073
62.....	3,063	.0022	29.....	734	.0068
26.....	2,544	.00229	11.....	175	.0064
118 9.....	598	.0023	37.....	321	.0064
67.....	500	.0023	14.....	6,916	.0089
35.....	40,948	.00245	33.....	805	.00947
1.....	1,220	.0026	83.....	1,645	.0235
32.....	4,981	.0026			

It is found that the following are reasonable allowances per head on account of interest:

\$.015 per head as to cattles and calves.

.007 per head as to hogs.

.004 per head as to sheep.

Profits

159. In addition to producing reasonable per head costs incident to the handling of the different species of livestock, reasonable rates should provide also for a per head profit, that is, compensation for management and the carrying of uninsurable risk. The two co-

operative market agencies and some of the other respondents are managed by employees. The remuneration received by employee-managers gives some indication as to what efficient management costs. In 1929 two of the respondent firms had employee-managers who did no selling. The cost of management was 92 cents per car in the case of one, and 99 cents in the case of the other. In 1931 the same two firms were paying a dollar per car and 80 cents per car. A per-head allowance on the basis of one dollar a car as to each species has been made on account of management.

160. The risks assumed by respondents may be said to fall roughly into three general classes. First, those against which insurance actually is carried by at least some of the respondents. Second, those of such a nature that insurance against them is conceivable, though not actually obtainable. Third, those involving a decline in, or cessation of respondents' businesses. The first class has been covered by an allowance in the reasonable cost under the item "insurance."

161. The second class comprises whatever liability respondents assume when they sell livestock, the title to which is defective; errors entering into accounting processes; failure of purchasers to make payments; litigation arising on account of bank failures; freight undercharges; and sales of diseased or defective livestock.

119 The experience of the respondents as reflected in the audits of their books and accounts for the years 1929 to 1931 indicate that the losses suffered on account of the risks of this class amount to only a few cents per car. A per head allowance on the basis of 10 cents per car as to each species has been made on account of this class of uninsurable risk.

162. The third class consists of the danger that, through economic changes or failure of those in charge of the businesses properly to conduct them, the volume of business enjoyed may decline even to the point where it becomes impracticable to continue the conduct of the business. It seems quite clear that nothing should be included in the rates to cover risks or losses due to bad management. It may be that the same is true of risks and losses arising from economic changes. But whoever should bear these risks there is no practicable way of appraising them. The rates hereinafter prescribed represent something more than the reasonable cost plus reasonable profit. That something consists of a substantial spread between the total of the reasonable costs and profits as found and the rates as prescribed, and is more than the amount reasonably to be allowed to cover such errors and omissions as may have crept into the rate making process.

Summary of Reasonable Selling Costs Plus Reasonable Profits

163. A summary of the foregoing findings as to reasonable per head costs and reasonable profits for selling each species of livestock arriving at the Kansas City market is as follows:

	Cattle and Calves	Hogs	Sheep
Managership.....	\$0. 1379	\$0. 0353	\$0. 0140
Advertising Salaries.....	.0750	.0300	.0080
Advertising Expenses.....	.0140	.0060	.0004
Office Salaries.....	.0525	.0300	.0100
Office Expenses.....	.0300	.0175	.0050
Business Getting and Maintaining.....	.0450	.0180	.0059
Administrative and General Expenses.....	.0330	.0200	.0050
Insurance.....	.0070	.0025	.0013
Interest.....	.0137	.0070	.0040
Total Cost.....	.4094	.1963	.0536
Profit:			
To cover management.....	.0360	.0133	.0040
To cover uninsurable risks.....	.0035	.0014	.0004
Total reasonable cost and reasonable profit.....	.4479	.1810	.0580

164. The audits covering the respective years 1929 and, 1931 show, as a rule, only slight differences in the expenses of the respondent firms who operated in both of those years. There occurred, too late to be reflected in the audits for 1931, increases in certain of respondents' lesser expenses, such as postage and taxation, but through salary and wage cuts, also made too late to be reflected in the audits, there occurred considerable decreases in one of the major expenses of the business. It follows, therefore, that the above stated costs cover the situation as it existed before the depression brought about reductions in expenses.

Buying Costs

165. Most of the respondent commission firms and all of the respondent order buyers are engaged in the buying of livestock on a commission basis. The commission men consider their buying activities as supplementary to their selling activities. Some of the salesmen also buy. In some firms there are those employed as buyers only. For the most part the same personnel employed in one activity is also engaged in the other. This is particularly true with respect to the office and yard forces. Most of the items of costs incident to the business of the commission firms are incurred jointly in selling and buying. Their unit costs for buying are the same in amount as those shown above for selling, except as to the items for salesmanship and for interest.

166. The record indicates that in the normal course of business a competent buyer can buy as many animals of a species as an equally competent salesman can sell. This fact, coupled with buying salaries paid, indicates that the cost to the respondent commission men for buying a unit of livestock is somewhat less than the cost of selling a like unit. Somewhat more capital is needed in the buying of livestock than in the selling of it. The interest cost is, therefore, somewhat greater.

167. An analysis of the costs incurred by those respondents engaged solely in the order buying business leads to the conclusion that

their unit costs for buying do not vary greatly from those incurred by the commission men in their buying activities.

168. On the basis of all the facts of record and the inferences
121 to be drawn from the record, it is found that the rates charged for buying livestock on the Kansas City market should not exceed those for selling livestock.

XXI. Rate Structure

169. Livestock does not arrive at market in standard units. It may arrive in lots of from one to many head. On the one hand such consignments may be of the same grade and may sell at one price, and require only one draft; on the other hand it may consist of many classes sold to various buyers and require numerous weight drafts. Obviously, the work occasioned in handling livestock under such circumstances will vary greatly and the cost of performing the service on different consignments will vary also. A tariff of rates and charges constructed to meet each variation and to assess precisely the cost occasioned by handling each consignment against that particular consignment, would be unduly complex. A schedule of rates which attempted to do exact justice by every consignment would be so complex as to be difficult of interpretation and impracticable of application. A tariff simple enough to be practicable and easy of application will work some inequities in some individual cases. A reasonable schedule of rates should do as nearly exact justice as is practicable. Therefore, the rate maker's problem is to find a structure which, when applied to the particular businesses under consideration, will avoid as far as possible unwieldy complexity on the one hand and on the other a simplicity which brings about too many arbitrary distinctions and too much inequity. From time to time attempts have been made to smooth out all arbitrary distinctions. The result has been not only a complexity undesirable in itself but also the creation by such complexity of new inequities. It is recognized, therefore, that any tariff structure which may be adopted can be applied to circumstances which, though not unique, are unusual, and thereby shown to work inequities. Bearing this in mind, balancing advantage against disadvantage, it is believed that a tariff structure only sufficiently complex to avoid serious inequities with respect to normal transactions is to be preferred.

170. Except as to Tariff No. 3, hereinafter discussed, market agency rate schedules at Kansas City have in the past been based quite generally upon the carlot of livestock as the unit of charge. The reason for this has been that the carlot has been the unit of handling.
122 Until comparatively recently practically all the livestock handled by market agencies at the Kansas City stockyard arrived there in railroad cars. The sales pens in the stockyard were constructed to hold one carlot comfortably and conveniently. It was the custom of buyers to buy by the carlot. In probably the majority of instances the single carlot was synonymous with the single con-

signment. With the growth of the practice of bringing livestock to market by motor truck and the increasing custom of buyers to purchase animals in less than carlots, as hereinbefore described, these conditions changed.

171. The filing by the great majority of the respondents of their Tariff No. 3 raises in this proceeding an issue not heretofore present in commission rate determinations made by the Secretary of Agriculture, namely, whether the rates prescribed by this order should be set up in the structure heretofore customary, or according to that desired by the respondents last above referred to, or in some modification of one or the other of those structures.

172. The record here shows that the consignment is the unit of handling. The consignment is, therefore, the unit of cost. Many items of cost attach to the consignment is substantially the same amount, regardless of whether it contains many or few animals. The identity of a consignment must be preserved throughout its entire handling in the stockyard; it must be separately accounted for by the office force. Some items of cost tend to increase as the number of animals in a consignment becomes greater, but probably none increase in direct proportion.

173. Certain modes of arrival of animals at the stockyard affect the number of animals contained in the respective consignments. On the whole, a thousand head of animals arriving by truck will represent more separate consignments than a similar number arriving by rail. This fact has caused it to be said that the so-called "truck-ins" are more expensive to handle than the rail arrivals, but analysis of the costs shown in the record, as well as the opinions of competent witnesses therein contained, compel the conclusion that it is not the mode of arrival but the average size of the consignment which fixes the per head cost of handling the animals. To base differentials in rates

up the modes of arrival is therefore to attack the problem indirectly rather than directly and produces different charges

for handling the same species, number, weight, kind, grade, and quality of animals in two separate consignments merely because one happened to come to the market in a vehicle propelled by gasoline and the other is one drawn by steam.

174. The various commission rate tariffs in force from time to time at the Kansas City stockyard since the effective date of the Packers and Stockyards Act, 1921, are in the record. At least since that date the tariffs have always contained some rates stated on a head basis, and they have also recognized at least one rate distinction based on differences in weights. Reference is here made to the common provision that bovine animals weighing on the average 400 lbs. or less, and called "calves," are handled at rates considerably lower than those weighing more than 400 lbs., and called "cattle." That this is purely a weight distinction becomes apparent when it is borne in mind that it is the average per head weight of the entire draft which controls and that thereby a 1,500 lb. bull may become a calf

by being weighed together with a sufficient number of bovines weighing from 200 to 300 pounds each.

175. In the filing of Tariff No. 3 respondents sought to readjust the structure of their schedules to the changed character of their business. In the formulation of this new tariff they tested certain suggested schedules by practical applications of them to the transactions they actually were handling. By a process of trial and error they arrived at a tariff which, though not going so far as some of them advocated, nevertheless constituted a step in the direction of a structure better fitted to the business of today than was the structure which it replaced.

176. At the last hearing in this proceeding this tariff structure was subjected to close scrutiny and analysis. The evidence compels the conclusion that while some inequities would result from an application of the principles upon which it was based, nevertheless on the whole such inequities are both fewer and less severe than those which would result from the application of the principles which had been discarded. Certain characteristics of this Tariff No. 3 appear to do violence to the basic principles upon which it rests.

There is, for instance, no difference in the rates for calves or cattle coming in by truck, as compared with those arriving by rail, but 5 cents more per head is charged for truck-in yearlings than for those coming in railroad cars, and quite generally the rates on truck-in sheep are higher than for those coming by rail. Also, a lower rate is made for so-called "yard sales" or "seconds," than for freshly arriving livestock.

177. The tariff structure adopted in this order eliminates these and other inconsistencies but otherwise follows in structure the aforesaid Tariff No. 3. It contains for the bovine species a weight class known as "yearlings," and a weight distinction as between light swine or pigs and heavy swine or hogs. In recognition of the fact that, as heretofore stated, the cost of handling a consignment does not increase directly in proportion to the increased number of head in the consignment, the tariff structure here adopted uses a consignment charge graduated according to the number of head in the consignment.

178. That which has been said with respect to the structure of the schedule for selling applies also to the structure for buying.

XXII. The Reasonableness of Existing Rates

179. Upon the basis of the reasonable costs hereinbefore determined, and upon a consideration of the entire record, it is found that respondents' schedules of rates and charges now under investigation contain rates and charges which are unreasonable and unjustly discriminatory.

XXIII. Reasonable Rates

180. Upon the basis of all the foregoing and the entire record, it is found that rates not in excess of the following are schedules of just and reasonable rates:

Article I—Definitions

Calves are animals of the bovine species, weighed in drafts, the average weight of the animals in which is 400 pounds or under.

Yearlings are animals of the bovine species, weighed in drafts, the average weight of the animals in which is from 401 pounds to 800 pounds.

Cattle are animals of the bovine species, weighed in drafts, the average weight of the animals in which is 801 pounds or over.

Pigs are swine, weighed in drafts, the average weight of the animals in which is 130 pounds or under.

Hogs are swine, weighed in drafts, the average weight of the animals in which is 131 pounds or over.

A Draft is all those animals in one consignment weighed as a single sales or purchase classification.

A Consignment, for the purpose of assessing selling charges, is all the livestock of one species delivered in the name of one person to one market agency to be offered for sale during the trading hours of one day, provided, however, that when the livestock of several owners arrives in one car, and in not more than one car, each species in that carlot shall be considered as one consignment.

A Consignment, for the purpose of assessing buying charges, is all the livestock of one species bought at any time but shipped or delivered to one person on one market day.

A Person is an individual, a partnership, a corporation, and/or an association of any such acting as a unit.

Article II—Selling Charges

Section A. Calves, Yearlings, and Cattle

Calves:	
Consignments of one head.....	40c per head
Consignments of more than one head:	
1 to 20 head, inclusive.....	25c per head
Each head over 20.....	15c per head
Yearlings:	
Consignments of one head.....	80c per head
Consignments of more than one head:	
1 to 20 head, inclusive.....	45c per head
Each head over 20.....	25c per head
Cattle:	
Consignments of one head.....	80c per head
Consignments of more than one head:	
1 to 20 head, inclusive.....	70c per head
Each head over 20.....	50c per head

Section B. Swine

Pigs:	
Consignments of one head.....	35c per head
Consignments of more than one head:	
1 to 40 head, inclusive.....	20c per head
Each head over 40.....	5c per head

Hogs:

Consignments of one head.....	35¢ per head
Consignments of more than one head:	
1 to 40 head, inclusive.....	25¢ per head
Each head over 40.....	5¢ per head

Section C. Sheep or Goats**Sheep or Goats:**

Consignments of one head.....	35¢ per head
Consignments of more than one head:	
For the first 10 head in each 300 head.....	25¢ per head
For the next 50 head in each 300 head.....	15¢ per head
For the next 60 head in each 300 head.....	5¢ per head
For the next 130 head in each 300 head.....	2¢ per head
For the next 50 head in each 300 head.....	1¢ per head

Article III.—Extra Service Charges

The following extra service charges are applicable to all species:

For each additional weight draft over 3, on account of sales classification.....	15¢
For each additional check, each additional account of sales, each proceeds deposit or bank credit over 1.....	5¢

Article IV—Buying Charges

The rates for buying livestock of the various species shall not be in excess of those for selling like species.

Order

It is Ordered that the respondent market agencies, and each and every one of them, on and after 30 days from the date hereof, 127 cease and desist from demanding or collecting for any stockyard service the rate or charge shown therefor in the schedule of rates and charges now on file with the Secretary of Agriculture.

It is Further Ordered that on and after 30 days from the date hereof neither the respondent market agencies nor any of them shall publish, demand, or collect any rate or charge for the furnishing of any stockyard service in excess of the rate or charge hereinbefore determined to be just, reasonable, and non-discriminatory for the furnishing of such service.

It is Further Ordered that at least ten days prior to the date upon which this order becomes effective each and every of the respondent market agencies publish, give notice of, and file with the Secretary of Agriculture, in accordance with the Packers and Stockyards Act, 1921, and the regulations of the Secretary of Agriculture thereunder, a schedule showing all rates and charges for the stockyard services furnished by such respondent at the Kansas City Stockyards, Kansas City, Missouri, and all rules and regulations changing, affecting, or determining such rates or charges, and that no rate or charge so shown for any such stockyard service be in excess of the rate or charge hereinbefore determined to be just, reasonable, and non-discriminatory for such service.

It is Further Ordered that a copy of this order be transmitted by registered mail to each and every one of the respondent market agencies.

In Witness Whereof the Secretary of Agriculture has signed this order and caused the official seal of the Department of Agriculture to be affixed hereto in the City of Washington this 14th day of June 1933.

HENRY A. WALLACE,
Secretary of Agriculture.

Exhibit B to petition

UNITED STATES OF AMERICA

Before the Secretary of Agriculture

Bureau of Animal Industry

2328. Docket No. 311

SECRETARY OF AGRICULTURE, COMPLAINANT

vs.

L. B. ANDREWS, DOING BUSINESS AS L. B. ANDREWS LIVE STOCK
COMMISSION COMPANY ET AL., RESPONDENTS

Petition for Re-investigation and Re-hearing

Comes now Fred O. Morgan, doing business as Fred O. Morgan Commission Company, a respondent herein, and respectfully petitions the Secretary of Agriculture that the Order under date of June 14, 1933, signed by Henry A. Wallace, as Secretary of Agriculture, in the above entitled proceeding be withdrawn and for naught held, and that these proceedings be re-opened for further hearing and re-investigation of the matters and things referred to in the Order of Inquiry and Notice of Hearing, and in said Order mentioned, for the reasons hereinafter stated:

I

Because the said Order purports to be based and predicated upon conditions shown by the evidence to have existed in respect to the business transacted by this respondent as a registered market agency at the Kansas City Stockyards in the year 1931 and prior thereto, and in the period intervening between December 31, 1931, and June 14, 1933, the date of said Order, and particularly during the year 1933, important changes have taken place in the conditions surrounding the operations of respondent as a market agency at the Kansas City Stockyards of such a nature as to cause, so far as the determination of the matters in said Order of Inquiry referred to are concerned, the evidence so taken and considered to be inaccurate, incomplete,

and in certain respects misleading as an expression of the present or future conditions as to revenues or costs affecting respondent's business. Changes occurring since the year 1931 affecting the issues in this proceeding are in part as follows:

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Reduction in Value of Dollar

(1) There has been in the year 1933 as a result of governmental action a substantial reduction in the purchasing power and value of the dollar in which the amount of rates and charges is expressed by the Order. The effect of this reduction, amounting as of this date to approximately 20 per cent, is given no consideration by the Order. It has already resulted in a general advance in prices and in the immediate future will inevitably further increase the expense of operating the business of respondents.

(2) The audits made by the government accountants in this proceeding disclose that in many classifications of service, the wages paid to employed workers, in 1931, were very meager. These wages have since been substantially reduced and are now at the absolute "starvation point" in view of recent increases in "cost of living." The hours of work are long. Enforcement of the Order would demand further reduction in personnel and wages. This would not be in the interest of the shippers of live stock, or in harmony with the spirit and purpose of recent Federal legislation and utterances of the President of the United States. The President in his radio address on May 8, 1933, said:

"The administration has the definite objective of raising commodity prices to such an extent that those who have borrowed money will, on the average, be able to repay that money in the same kind of dollar which they borrowed.

"We do not seek to let them get such a cheap dollar that they will be able to pay back in great deal less than they borrowed.

"In other words we seek to correct a wrong and not create another wrong in the opposite direction. That is why powers are being given the administration to provide, if necessary, for an enlargement of credit, in order to correct the existing wrong. These powers will be used when, as, and if it may be necessary to accomplish the purpose."

Chicago Rates Undetermined

(3) A hearing is now being held at the Chicago Union Stock Yards under order of the Secretary in respect to the rates and charges of market agencies at that stock yards. As shown by the evidence taken at the hearings in this proceeding the rates and charges of market agencies at Chicago were, at the outset of the inquiry, substantially in excess of rates and charges for similar services of this respondent. Since the reduction of approximately ten per cent made by this respondent in 1932 the rates and charges at Chicago are approximately 25 per cent in excess of the rates and

arges of respondent at Kansas City, and in respect to many com-
n or usual consignments of livestock, more than $33\frac{1}{3}$ per cent
excess of respondent's rates and charges. The reduction pro-
posed by the Order in respondent's rates, which are fixed at levels
stantially below similar rates at any other market, would so
turb and render non-uniform the rates and charges at these two
ortant competitive markets as to demand and suggest deferment
the effective date of the order herein, and a re-hearing to the
that consideration might be given by the secretary after re-
viewing the evidence taken in Chicago to the subject of uniformity
of rate structure at the two competitive markets.

(4) The undisputed evidence at the hearings in this pro-
ceeding disclosed higher market agency operating costs at Kan-
sas City than at others of the five leading competitive markets due to
ater variability of volume of receipts of livestock at Kansas
y; greater diversity in grades of livestock received; delivery of
cked-in livestock to market agencies at unloading chutes instead
at pens assigned to agencies; the greater area from which re-
pts are drawn; the large proportion of stocker and feeder cattle
dled necessitating double contacts with sellers in the west and
ers in central and eastern portions of the United States; and
reased expenditure of money and effort in connection with ap-
ising, supervising, and pasturage of livestock en route to market.

(5) The evidence showed that peak receipts by month or week at
ansas City were equal in volume as to cattle to peak receipts by
ath or week at Chicago, although the average volume at Kansas
y was approximately fifty per cent of the average at Chicago.
pite the higher prevailing rates at Chicago as the Order states,
percentage of livestock marketed from the territory tributary
Kansas City at Chicago, as well as at other markets with higher
s and charges, has been increasing.

(6) A statement showing the rate differentials on representative
signments of cattle between the rates approved by the Order
those now in effect at other markets follows:

	Yeast calves under 400#, avg. car 75 head	Stk. calves under 400#, avg. car 60 head	Fed yrlys. 650-800#, avg. car 35 head	Stkr. yrlys. 400-700#, avg. car 45 head	Fat hvy. cattle 1,300-1,400#, avg. car 20 head
Order 7-14-33.....	13.25	11.00	12.00	14.00	14.00
seph.....	16.50	16.50	16.50	16.50	13.00
ut.....	15.50	15.50	15.50	15.50	13.00
.....	15.00	15.00	15.00	15.00	15.00
go.....	22.00	20.00	21.00	21.00	17.00

	2 avg. cars 150 head	2 avg. cars 120 head	2 avg. cars 70 head	2 avg. cars 60 head	2 avg. cars 40 head
Order 7-14-33.....	24.50	20.00	26.75	26.25	24.00
seph.....	33.00	33.00	33.00	33.00	26.00
ut.....	31.00	31.00	31.00	31.00	26.00
.....	30.00	30.00	30.00	30.00	30.00
go.....	44.00	40.00	42.00	42.00	34.00

131 **Gross Income of Respondents Already Down 40%. Since 1929 and Further Reduction as Contemplated by Order Would be Confiscatory.**

(7) Comparisons applying to 40 of the respondents (exclusive of co-operatives) doing the largest volume of business, have been made of gross revenues received during the year 1932 and during the first five months of the current year (1933) with the gross revenues received in the prior years of 1929 and 1931 as shown by government audits of the business of the same respondents. Inclusion of the two cooperative agencies which handle approximately ten percent of the total volume of livestock receipts would not substantially alter the percentages of decrease. Gross revenues as compared with 1929 decreased 13% in 1931, 24.54% in 1932, and for the first five months of 1933 were 42.34% less than the gross revenues for the first five months of 1929. The income of these respondents derived from selling commissions for the first five months of 1933 was 18.96% less than their income during the first five months of 1932. If comparisons were made with gross revenues during the years prior to 1929 the percentage of reductions would be much greater. This indicates that these respondents, faced with higher living costs as they are, have taken even greater punishment through reduction of income than the stockmen whom they represent at the market.

(8) This respondent has reduced expenditures in every possible direction consistent with retaining in the public interest efficiency in the rendition of stockyard services. Certain overhead costs such as rent, utility service, transportation, taxes, etc. which the record shows have increased on an average of more than 200% since 1913, respondent is powerless to reduce in amount if expected to continue in business. After all possible expense reductions have been made and all practicable economies effected, the owners of respondent's business are now receiving no fairly compensatory return for the time, effort, and money expended and used therein. The rates proposed by the order would further reduce gross revenues of this and the other respondents mentioned by an average of not less than 15.23 per cent in respect to cattle and calves; by not less than 2.49 per cent in respect to hogs; and by not less than 11.90 per cent in respect to sheep. Upon cattle weighing from 400 to 800 lbs. the reductions amount to 29.28 per cent of present revenue. It is manifest that such a reduction superimposed upon reductions already in effect under present conditions would either compel respondent to cease business or impair the efficiency of the stockyard services rendered by respondent. Enforcement of the order as made would produce a result entirely out of harmony with the policy of the present administration as announced by the President of the United States in his radio address delivered May 8, 1933, when he said:

"Further legislation has been taken up which goes much more fundamentally into our economic problems. The farm relief bill seeks by the use of several methods, along or together, to bring about

an increased return to farmers for their major farm products, seeking at the same time to prevent in the days to come disastrous overproduction which so often in the past has kept farm commodity prices far below a reasonable return. This measure provides wide powers for emergencies. The extent of its use will depend entirely upon what the future has in store.

132 "Well considered and conservative measures will likewise be proposed which will attempt to give to the industrial workers of the country a more fair wage return, prevent cut-throat competition and unduly long hours for labor, and at the same time to encourage each industry to prevent overproduction."

Impairment of Selling Efficiency Injures Stockmen

(9) The effect of loss of selling efficiency is demonstrated beyond question by respondent's Exhibit #248. As a result of the greater rapidity of salesmanship demanded in handling drive-ins as compared with rail consignments, hogs arriving by rail sold at an average of \$1.70 per head more than those delivered by truck. Trucked-in hogs average higher in grade and quality at Kansas City than those received by rail. This difference is eight times the present commission charge. Important differences exist in the per head selling price of other species in favor of the rail consignments but no accurate comparison could be made as to the relative quality of the average receipts of those species as between rail and drive-in consignments. The evidence is clear and positive. Producers of livestock who testified at the hearing were well justified in making the statements, repeatedly emphasized, to the effect that they were more interested in the efficiency of salesmanship than in the amount charged therefor. This is the practical consideration which must be given the greatest weight in determination of livestock commission charges. One man might sell a very large volume of livestock in a day on any public market if he is at all willing to sacrifice the interest of his principals. The most inexperienced, or the least energetic or the dishonest agent can consummate sales with greater rapidity than the salesmen of experience, energy, and integrity. The stockman knows that cheap or underpaid salesmanship is costly salesmanship.

Other Changes Since Hearing

(10) The abolition at the Kansas City Stock Yards as of July 1, 1933, of the activities of the Bureau of Markets in respect to livestock, and the order of the Farm Credit Administration on June 5, 1933, relating to the consignment to affiliates of the National Livestock Marketing Associations, of livestock upon which Regional Agricultural Credit Corporations have loaned money, have served to radically alter the conditions upon which the Order as made was predicated, and under which the respondents must henceforth operate.

Revenue Yield of Rates Undetermined by Order

(11) It is highly important that the Secretary be correctly advised as to the effect the rates and charges approved will have upon respondent's income. The evidence disclosed that this effect can only be determined through an actual application of the rates and charges to the consignments handled by respondent during a representative period. At the time the present schedule of this respondent was filed in May 1932, as shown by the evidence, accountants for the Secretary estimated a reduction of only four per cent in the yield of those rates as compared with the schedule theretofore in effect. Accountants for the respondents made an actual application of the new schedule to the business for the respondents for the year 1931. This demonstrated that the actual reduction, if these rates had been in effect during that year, would have been 9.2 per cent. It now appears through the actual use of the new schedule, due to the changing consist of the volume of the business handled, depreciating its revenue producing ability, that the percentage ascertained by respondent's accountants was less than actually experienced. The actual operations of forty of the respondents handling the largest volume of business, exclusive of co-operatives, shows that in the first five months of 1933 when the new schedule was in effect, their gross income from selling rates was less by 18.96% than their total gross income from selling commissions during the same five months of 1932, when the former schedule was in effect. A very small portion of this reduction in income was due to a diminished volume. A change in the consist of the business handled, from rail consignments to truck-ins, for example, increased the effect of the reductions contained in the schedule as compared with the reduction that would have occurred had the new schedule applied to the particular volume handled in 1931.

(12) The accountants for the Government did not assemble through the audits made by them information which enabled them to apply to actual consignments a tariff similar in form and structure to that approved by the Order. Advantage was not taken of the offer of the respondents to permit access to records in their possession and information assembled by their accountants to test the effect of the proposed schedule. It is therefore in the public interest that the Secretary conduct a further investigation in order that he may be fully and accurately advised as to the effect upon respondent's income, and the efficiency of the service rendered by them, of the rates and charges approved as just and reasonable by the Order.

(13) By reason of the foregoing, respondent requests and desires a re-hearing and re-investigation of the matters in said Order of Inquiry herein referred to and the opportunity to introduce further evidence in respect to the matters and things in this section of this motion referred to, in order that justice may be done herein and that the Schedule of Rates and Charges under inquiry may be approved in

amounts not less than those stated therein, as well as to form and structure, as just, reasonable, and non-discriminatory Schedule of Rates and Charges.

II

(14) The findings of fact contained in the Order overlook relevant and important evidence taken at the hearings consideration of which is absolutely essential to a fair determination of a just, reasonable, and non-discriminatory schedule of rates and charges.

Market Developed Under Higher Rates

(15) The findings of fact contain the statement that the
134 public Stockyards at Kansas City was established in 1871; that demand by the producers of livestock for the services of representatives to sell their livestock resulted in the establishment of market agencies and a Live Stock Exchange, but overlook the undisputed testimony showing that at the outset and through the years of greatest development of the market the rates and charges of market agencies were established on a unit basis determined in such a manner as to yield a gross revenue to such agencies approximately equal to 2% of the gross proceeds of livestock handled by them; that the gross revenue yield of the rates under inquiry, even at the extraordinarily low prices for livestock existing in the years 1931 and 1932, and despite the increased costs incident to greatly reduced headage per sale yield a total gross revenue of less than 2% of the gross proceeds of the sale of such livestock.

Rates Less Than Charges for Selling Other Agricultural Commodities—Work and Responsibility Greater

(16) The order fails to refer to or in any manner reflect in the conclusions therein contained the undisputed evidence showing that at all the times to which the evidence at the hearing related, the rates and charges of this respondent and other respondents under inquiry expressed in percentage of sales proceeds were less in amount than commissions charged in respect to the similar sale or handling of any other agricultural product despite the fact that the service on a unit basis, due to the variability in the grades and prices of the commodity handled and its perishable character, involves greater expenditure of time, money and effort per unit handled, and requires a higher degree of professional proficiency than in respect to any other of such compared commodities. The Order fails to give weight to the established practice of relating individual rates to the value of the product handled.

War-Time Rate Increases Insignificant

(17) The Order fails to refer to or reflect in its conclusions the undisputed evidence taken at the hearings showing that despite in-

creased costs during the War period from 1913 to 1919, the rates and charges of these agencies were increased by only 10% over the 1913 level, whereas increases occurred in cost of living, in farm wages, in general hourly wages, in livestock prices, in wholesaling and processing costs in respect to livestock and its products, in meat retailing costs, in transportation charges, in brokerage or commission charges on other agricultural commodities averaging approximately 200%. The Order also fails to refer to the fact that the rates and charges found to be reasonable are in many instances less than the prevailing charge for the rental or use of the pens in which the livestock sold is yarded.

Schedule In Force at Commencement of Proceedings Established By Secretary After Hearing Held During Low Price Period

(18) The finding of fact set forth in Paragraph 23 of said 135 Order, referring to the Schedule of Rates and Charges, and in effect from and after January 1, 1926, fails to state, as shown by all the evidence, that said Schedule of Rates and Charges was formulated and approved by the Secretary of Agriculture after a hearing upon notice of inquiry, and this respondent ordered and directed to file same with such Secretary; that the rates and charges found by said Order to be unjust and unreasonable in amount were rates and charges under the Schedule filed May 11, 1932, accomplishing a substantial reduction in the gross revenues derived under the Schedule of Rates and Charges theretofore established by the Secretary and determined after hearing to be just, reasonable and non-discriminatory as applied to conditions much more favorable to respondent as to net operating income than those existing from 1929 to 1933. The year 1923 was used as a test period in the former order. In 1932 receipts of cattle and calves were 42.20% less, of hogs 56.85% less, and of sheep 9.9% more than in 1923.

Registration of Additional Agencies Accepted Under Act Regardless of Qualifications or Public Necessity

(19) The Order, in Paragraph 129 thereof, states that the Packers and Stockyards Act, 1921, does not clothe the Secretary with authority to determine how many agencies would be required to handle business at the Kansas City Stockyards properly, but fails to state that the records on file in the Secretary's office and offered in evidence disclose that the Secretary has registered as market agencies at the Kansas City Stockyards as competitors of this respondent registrants who had previously been expelled from membership in the Kansas City Live Stock Exchange for confessed misapplication and embezzlement of the proceeds of sales of livestock; and has compelled, through court proceedings, the said Exchange to extend to such registrants and other additional registrants not members of said Exchange all of the facilities of said Exchange, including the services of the Clearing House, participation in the blanket fire insurance policy main-

tained by the Exchange, and the hog dockage and inspection service operated by the Exchange. The Secretary not only established the rates first placed under inquiry, but has deprived the Exchange, under said Act, of the right, power, or authority to control or regulate the number of personnel of those engaged in business as market agencies at said stockyards.

Market Practice Agreement

(20) The fact that the Secretary, by and through his duly authorized representatives, assisted in the preparation and formulation of the Market Practice Agreement offered in evidence, and participates in the enforcement thereof, whereby there are approved and established rules in respect to the character and amount of solicitation and business-getting efforts and expenses similar in purport and effect as to non-members of the Exchange as those in effect under the rules of the Exchange as to member agencies such as this respondent, is not set out or referred to in said Order.

136 Private Stockyard Operation by Packers Increases Marketing Costs

(21) The Order, in Paragraph 50 thereof, states that the demand for livestock at Kansas City, particularly for hogs, is greater than the supply of livestock on the public market and sets forth the increasingly large number of hogs received by packers direct at their plants through private stockyard operation during the period from 1929 to August 1932, but fails to mention the fact that the undisputed evidence disclosed that such purchases of livestock were made upon the basis and through the use of market prices for livestock determined upon the public market at Kansas City by and through the efforts of this and others of the respondents. Despite the fact that the benefit of using prices established by the public market at Kansas City was available to such purchasers, they did not, and do not now, bear any portion of the burden of costs of maintaining the Kansas City market which fall upon this respondent and others at the market. Unfair competitive methods and practices are employed by packers in connection with the making of such purchases to the detriment of the producers of hogs. (Report of Committee on Agriculture, United States Senate, Exhibit 2.)

Preferential Railroad Rates Protect Unfair Competition at Railroad Stockyards

(22) The Order states that livestock tends to move from producer to consumers by the most economical route, and that freight rate structure or railroad transportation systems are the chief factors in delimiting trade territory (Paragraph 19). The Order fails to mention, however, the evidence in the record disclosing that in the early part of the year 1932 there were established differentials giving pref-

erential rates to railroad stockyards at Prospect, Missouri, and Morris, Kansas, within eight miles of the Kansas City Stock Yards, and at many other railroad stockyard or concentration points in said trade territory amounting to many times the total of all marketing costs or charges for stockyard services at the Kansas City Stock Yards. The market privilege of reconsignment in transit with change of ownership on through billing was taken away from the Kansas City Stock Yards but remains available at the competing railroad stockyards. The conclusions of the Secretary ignore and fail to reflect or give any weight whatsoever to this situation and to its future effect upon the volume of business to be transacted by this and other respondents at the said Kansas City Stock Yards or to the obstruction which such preferences create to the flow of commerce in livestock through said stockyards.

III

(23) The conclusions contained in the Order and expressed in the Schedule of Rates and Charges approved are predicated upon hypothetical standards of salesmanship performance not actually attained by this respondent or others of the respondents in the practical conduct and management of their respective businesses. Such standards of performance are not only contrary to all of the competent and credible evidence before the Secretary but would be manifestly impossible of attainment in the practical operation of the market without complete destruction of its present efficiency from the sellers' standpoint.

137 Salesmanship Standards Specified

(24) The Order in Paragraphs 142 and 143 states that it was reasonable to expect a salesman of cattle and calves to sell 29,000 head of cattle a year; a salesman of hogs to sell 85,000 head of hogs a year, and a salesman of sheep to sell 250,000 head of sheep a year. Each of such salesmen is presumed by the order in the subsequent formulation of costs to provide all of the services incidental but necessary to the selling operation customarily performed by these salesmen. Such services include the maintenance of contact with the owners of livestock prior to shipment; appraisal, in the country; supervision en route to market either while on pasture, in Flint Hills, in feed lots or at feeding stations; keeping informed as to the changing market conditions; sorting and grading the livestock after arrival; directing the attention of suitable buyers to the livestock; interviewing and consulting with the owners of live stock at the market or advising them of the results of the sale if away from the market; together with such other duties as are usually performed by competent and efficient salesmen.

These Standards Unattained in Actual Operation

(25) The evidence discloses that no individual salesman of this respondent or any other respondent agency or salesman at any other

public stockyards during the year 1931, or any other year, has reached or attained such a standard of performance and efficient salesmanship. The average number of head handled per salesman, either in the years 1929 or 1931, or any other year, of this respondent or of any other of the 60 respondents in this proceeding, is not shown by the evidence before the Secretary to have reached such a standard of performance or to have approached such standard.

Would Create Inefficiency and Destroy Market

(26) There were engaged in 1931, as shown by the evidence, in the actual selling of cattle and calves 84 owner salesmen and 104 employed salesmen, a total of 188 trained, experienced and competent men, who used all of their time in the performance of this function and in duties incidental thereto. These salesmen made 437,688 separate and distinct sales of cattle and calves totaling in number 2,284,207 head. If the conclusion reached in the Secretary's order was sound these salesmen should be reduced in number to a total of 78.77 men who would be required throughout the year to consummate sales of separate lots of cattle and calves, each of an average value of \$242.78, at the rate of 8.9 sales per actual selling hour. This statement assumes the fact shown to exist by the record that the market at Kansas City is practically a four day market and that each day has on an average three active selling hours. It further assumes a situation impossible of attainment in that it is based upon an absolutely even division of receipts among each and all of these salesmen. It ignores, likewise, the tremendous daily, weekly, and seasonal variation in the quantity of total receipts of cattle and calves. The effect of the Secretary's order would be to increase the amount of sales proceeds per salesman actually realized in 1931 from \$905.55 per hour to \$2,161.32 per hour. When the variability of the grade and quality of the livestock is carried in mind and the fact that these salesmen, unlike ordinary salesmen, determine the price to be asked for the commodity they sell, it is all the more manifest how unreasonable and impossible of consummation with efficiency is the standard set, and also how effective is the work now performed. Should the consummation of such a reduction in personnel be seriously attempted it is certain that a tremendous uproar, of protest would arise from those who patronize the market. If accomplished and receipts of cattle and calves continue to arrive at the market, the result would be a staggering loss to shippers amounting to many times the total of all market charges. This is disclosed in the evidence showing the effect on selling efficiency of the greater rapidity of sales incident to the disposition of drive-ins, a subject which has been heretofore mentioned.

(27) The evidence shows that cattle salesmen in 1931 actually consummated 3.73 sales involving 19.47 head per hour. In view of the increased number of drive-in consignments of reduced headage, the changes referred to in the Order in the custom of buyers, it is

submitted that the present standard of performance is all that can be reasonably expected without reduction of efficiency.

(23) In respect to hogs there were in 1931 15 owner salesmen and 35 employed salesmen, a total of 50 salesmen, who disposed of 1,045,048 hogs. Upon the assumption contained in the Secretary's order the number of these salesmen would be reduced to 12.3. Each salesman would be required to make 13.48 sales per hour, each of an average value of \$141.94. The actual number made in 1931 was 3.31 per active selling hour. The respondent whose records show the greatest rapidity of salesmanship in respect to hogs testified that on many occasions he had been unable to secure the most efficient salesmanship due to the over-crowding of work.

(29) There were engaged in 1931 in selling sheep four owners and eleven employes, a total of fifteen men. These salesmen sold 1,896,608 head, making 4.58 sales comprising 202.63 head per hour per salesman. Under the Secretary's Order the number of these salesmen would be reduced to 7.59, who would be required to make 9.05 sales per hour. The value per sale in 1931 was \$235.80. The average number of head per sale was 44.24. Under the Order each salesman would be required to sell 400.47 head per active selling hour. The record discloses extremes in the daily, weekly, and seasonal variation in receipts of sheep: Circumstances require close and careful examination of each sheep sold in many instances. The mere statement that the result of the standard makes this average requirement shows how impossible of attainment with retention of efficiency such a standard would be. Accomplishment of the result demanded would be completely destructive of the sheep market in Kansas City and would create such an obstruction to the current of commerce in respect to sheep to the Kansas City Stock Yards as in and of itself to constitute a violation of the provisions of the Packers and Stock Yards Act of 1921.

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IV

(30) The Order in failing to recognize as part of the reasonable cost of the operation of respondent's business the amounts actually expended in connection with the activities designated as "Business-Getting and Maintaining" by the Government accountants is clearly without supporting evidence, in conflict with the testimony of all witnesses at the hearings and constitutes unjustified invasion of the right of the respondent to manage and conduct its business.

Expense Classification Misinterpreted

(31) The Order, in dealing with the expenditures classified under the title "Business-Getting and Maintaining" by the Government accountant, has inadvertently misconstrued and misunderstood the character of expenses so classified and dealt with this classification upon the theory that it included only expenditures incidental to obtaining, through advertising or other forms of solicitation, new busi-

ness. As a matter of fact it included not only the expenses classified as "advertising" by the accountants but also all traveling expenditures such as expense incident to the operation of automobiles used in the business; all dues and assessments paid by market agencies for the support of the varied and essential activities of the Live Stock Exchange and also a proportionate part of the salaries of the salesmen representative of the time involved in appraising or supervising livestock en route to market. Under "advertising" was included as the major item of expense all circular market letters sent out by the respondents to inform shippers as to the condition of the market. It is evident from the Order that all of these expenditures were considered as comprising solely newspaper and magazine advertising and expense incident to the entertainment of prospective customers. The evidence shows conclusively that the total entertainment expense of all the 60 agencies sustained through the year was approximately \$3,000 and that the total amount actually spent for advertising by all the agencies was less than \$25,000.00. All of the witnesses testified that of the remainder of the expenditures so classified not less than 85% thereof were incurred as an essential part of the selling and buying operations on the market and in servicing of the livestock handled. It is therefore plainly evident that the Secretary through misinterpretation of the procedure followed by the accountants and the actual meaning of the term "Business Getting and Maintaining" descriptive of this classification, disallowed expenditures actually incurred by this and others of the respondents necessary and essential to sound and economical management and operation of their respective businesses.

Expenditures Now Disallowed Approved By Secretary When
Incurred

(32) The evidence discloses that prior to the year 1929 there had been issued by the Secretary in Technical Bulletin 57 (Exhibit 18) of the Department of Agriculture, instructions and directions to those of the respondent market agencies doing business on the co-operative plan and in competition with this respondent for business at the Kansas City Stock Yards to engage in all of the activities in respect to advertising and getting business this respondent is shown to have engaged in, and incur expenses incident thereto greater in amount and more varied in character than those actually incurred by respondent disallowed in whole or in part by the Secretary in this Order.

Expense Eliminations by Auditor

(33) The Order apparently overlooks the fact that the Government auditor in preparing the costs dealt with in the Order eliminated therefrom an item of \$3,432.09 expended by the respondents under the title "Charity and Donations," practically all of this expenditure be-

ing made in support of a community chest or general charity campaigns conducted by the Chambers of Commerce of Kansas City, Missouri, and Kansas City, Kansas. This elimination was improperly made inasmuch as it constituted a necessary obligation of this respondent and the other respondents as incidental to the maintenance of its business in said cities. There was also eliminated by the auditor and not considered by the Secretary an item of \$13,962.98 representing losses of the various respondents incident to the refusal of purchases by patrons of respondents. This constituted an expense incident to the business which should have been recognized as a part of the reasonable cost of operation.

Solicitation Cost Not Excessive

(34) All of the evidence of the hearings disclosed that the expenditures for advertising and other expenses incident to the solicitation of business were actually made by this and others of the respondents in good faith in the exercise of sound business judgment for proper purposes and were not excessive in amount or unnecessary in character.

Exchange Limitations on Solicitation

(35) All of the evidence before the Secretary shows that the respondent obeyed and conformed to rules of the Kansas City Live Stock Exchange restraining and limiting expenditures by respondent and other respondents, members of said Exchange, in the entertainment of shippers or buyers of livestock, in the use of telephone or telegraph facilities for the solicitation of business, in the expenditure of time away from the market, in using the radio for advertising purposes, and other activities normally incident to the solicitation of business.

Competitive Conditions Render Essential Increased Business-Getting Expenditures

(36) The Order shows upon its face although it does not recognize the necessity for greater instead of less business getting effort and expenditure on the part of this respondent and the other respondents. It is shown that marketings of livestock from territory tributary to the Kansas City market have been increasing in volume and percentage at Chicago and St. Louis where commission rates were much higher than those in effect at Kansas City. Governmental agencies have extended financial assistance to a cooperative marketing association at Kansas City, one of the respondents, in order to indirectly finance business-getting efforts of similar character by such association. Undisputed testimony discloses the intensity of efforts of packers to divert livestock from the public market to their private stock yards or concentration points. In order that the flow of livestock through the market be maintained in accordance with the purpose of the Packers and Stockyards Act it is essential that these

efforts and this competition be adequately met by counter effort and expenditure. The record clearly indicates the necessity for greater rather than less expenditure of time, effort, and money to attract receipts of livestock.

(37) There is no principle of business management more universally recognized today than that the industry or individual business enterprise which fails to adequately advertise the utility and value of its service or product will surely perish in the stress of modern competition. The correlative principle that lower, not higher, unit costs are secured by well-considered advertising programs and sound promotional work is equally well recognized.

Amount Allowed Wholly Inadequate

(38) The amount of expenses as above classified and recognized by the Secretary and covered into the rates established would be insufficient to pay traveling expenses actually incurred and would leave nothing for the support of the Exchange, for the sending out of market circulars and market information, for any form of advertising, for the operation of automobiles, or for the entertainment of patrons. It is earnestly and sincerely suggested that such a situation would not only mean the destruction of the business of this respondent but the elimination of the competitive livestock market at Kansas City and the discontinuance of the effective and essential public service which it has rendered or would in the future render to livestock producers in the territory tributary thereto.

V

(39) The failure of the Order to recognize as a part of the reasonable cost of operating the business of this respondent salaries actually paid to employed salesmen, and the appraised value of owner-salesman's services actually devoted to the business, is clearly without support in the evidence.

Wages of Employed Salesmen Already Non-Compensatory

(40) As a result of the over-powering compulsion of greatly reduced gross revenues received by employing marketing agencies, including this respondent, the salaries of all employes, as set out in said report, were non-compensatory for the services rendered even in 1929 and during the period prior thereto. The rates and charges collected by the respondents neither during the world war nor during the period of recovery subsequent to 1921 followed the general increases in the cost of other services and commodities.

Hence salaries remained at relatively low levels. The reductions subsequent to 1929 in gross revenues further reduced compensations paid. Increased drive-in business, multiplying consignments, and necessary operations in respect thereto required

more work and additional personnel without corresponding increase in revenues.

Qualifications of Witnesses Testifying as to Value of Owner-Workers' Services not Recognized

(41) The Order, in Paragraph 135, states that the witnesses who testified as to the actual value, in their opinion and judgment, of the owner-worker's services in connection with the rendition of stockyard services during the year 1931 possessed no peculiar qualifications authorizing their expression of expert opinion or judgment upon this subject, but the Order fails to state who these witnesses were and that each and all of them were men particularly qualified by acquaintanceship with the practical conduct of the business, with the men whose services were being appraised, by personal business experience either upon the market as buyers of livestock or as bankers financing livestock transactions, or as producers of livestock sold upon the market to evaluate the services appraised. In discarding their testimony and fixing a flat amount of \$4,000.00 per year as representative of the value of the services of these owner-salesmen, as well as of employed salesmen, the Order ignores not only all the testimony in the record showing that no two salesmen, either owners or employees, were alike in ability, capacity, or energy, but also knowledge common to all, that no two individuals are alike in ability in any given line of endeavor.

Method Employed Unsound

(42) It is apparent that the standard compensation fixed by the order for salesmen is very little in recess of the average fixed by the appraisers as to owner-workers. This result does not establish the soundness of the method employed. Before the last hearing respondent requested the Secretary to join in the selection of witnesses competent to appraise owner-workers services. The Secretary refused. The Order incorrectly and unfairly states that the witnesses who testified on this subject were not particularly qualified to express opinions and judgment on these values. This is manifestly in the light of the record an erroneous statement and constitutes an unfair reflection upon the qualifications, capacity, experience, and fairness of the witnesses, who were each and all of them men of outstanding ability, integrity, and possessed of experience and knowledge particularly qualifying them to give expert testimony upon this subject. The Order should frankly recognize these qualifications. In the so-called Omaha case to which the Order referred as justification for the method employed the respondents presented no evidence whatsoever of this character, and in fact, as the Supreme Court of the United States said in its opinion, presented little or no evidence of any description.

Personnel Required

(43) The conclusions reached in the order in respect to increase or decrease in the number of workers employed in rendering stockyard services furnished by respondents overlooks the findings of fact contained in the prior sections of the order (Paragraphs 25 & 28). These findings based on the evidence show the necessity for a very great increase in the number of men required to render efficiently these stockyard services on account of the great reductions per consignment and per sale, which, as the findings state, has given to respondent's business "the aspects of the retail handling of a commodity" instead of a wholesale handling, and has brought about increased cost per head of live stock handled.

Salaries Reduced

(44) The Order states (paragraph 113) "The general impression gained from the record is, however, that respondents, in the face of almost universal lower levels in the United States, are attempting to maintain their personnel and the salaries thereof at the levels obtaining in the more prosperous year, 1929. This necessarily has a depressing effect upon the net moneys available to the owners of these businesses which may be designated 'net owner incomes.'" It will be recalled during 1931 the then President of the United States made public appeals to employers in general to maintain wage scales. The statement as made in the Order is, however, incorrect. The cost study made by the government's chief accountant shows that the average wage of non-owner employes handling cattle and calves was \$3,957.00 in 1929 and \$2,809.00 in 1931. Employes engaged in handling hogs received an average wage of \$2,644.00 in 1929 and only \$2,122.00 in 1931. Employes engaged in handling sheep received an average wage of \$3,513.00 in 1929 and only \$3,029.00 in 1931. The comparative reductions in average owner compensation included in the Government audits as between the two years were greatly in excess of the reductions in respect to compensation of employes.

VI

(45) The Order fails to recognize and include in the reasonable cost of the operation of the respondent's business a fair return upon the capital necessary and essential to such operation.

Capital Invested

(46) The audits made by government accountants of the business of these respondents disclose net worth as of January 1, 1931, amounting to \$1,010,145.11, and as of December 31, 1931, a net worth of \$824,408.92; the general average of such net worth throughout the year amounting to the sum of \$917,277.00. In addition the account-

ants recognize but fail to consider in assembling their costs, expenditures actually made for interest on exchange in collection by respondents amounting during the year to \$18,796.51.

Interest Return

(47) The Order held that a rate return of 6% on fixed capital and 7% on working capital was reasonable. In so holding the Order is in conflict with the testimony of many witnesses, including experienced bankers and others to the effect that rates in excess of 8% per annum were reasonable and would be required to induce the investment of capital in the business of a market agency under the conditions existing in 1931 with respect to the business of this respondent.

Amount Recognized Insufficient

(48) The Secretary allowed a return on invested capital of only \$54,486.04 for the year 1931. This respondent and the other respondents in accordance with their respective use and employment of capital were lawfully entitled to a return of not less than \$73,382.16 upon capital of their own used and useful in their respective businesses, and in addition the sum of \$18,796.51, representing expenditures for the use of borrowed capital, or a total of \$92,178.67. The Order therefore denies this respondent a fair return upon the capital employed by it, useful and necessary to the stockyard services rendered, and in so doing takes the property of this respondent without due process of law and in violation of the fifth amendment to the Constitution of the United States.

Financial Responsibility Required

(49) The Order recites, in Paragraph 80 thereof, that this respondent and other respondents have filed with the Secretary what is denominated by the Order as a "Remittance Bond" to guarantee the faithful remittance of the proceeds of sales of livestock by respondents to the owners of such livestock, but fails to state that the form of bond given by this respondent and other respondents is not that of a mere fidelity or remittance bond, but is that of a contract bond, not only guaranteeing the faithful remittance of proceeds received for livestock sold, but guaranteeing prompt payment for all livestock purchased. The conclusion appears in said paragraph that the maintenance of said bonds, aggregating in excess of \$1,200,000.00 in penalty amount, necessitates but "a small amount of capital." In reaching such a conclusion upon the facts disclosed by this record, the Order violates all well-recognized and established principles of sound suretyship and underwriting and is not in accordance with fact, and denies to this respondent a fair return upon part of the capital necessarily employed in the conduct of its business. Such

conclusion is directly at variance with an order of the Farm Credit Administration issued at Washington, D. C., on June 13, 1933, to the effect that livestock should only be consigned to market agencies of recognized "facilities, experience and financial responsibility."

Going Concern Value Eliminated

(50) The Order fails to give cognizance to evidence in the record as to the cost of the establishment in the business of this respondent, as well as other respondents, of the routines, methods and practices necessary to create a going business as a market agency, and fails to include as any part of the capital of this respondent upon which a return is allowed by said Order, any item or element reflecting
145 such cost or representative in whole or in part of going concern value. The Order attempts to interpret the evidence submitted by petitioner as being representative of the cost of acquainting employees with the methods, practices and routines essential and useful in the transaction of the business of this respondent, whereas the value so claimed by respondent as a part of its capital was, as the testimony shows, representative of the cost of establishing and coordinating in a going business these routines, methods and practices essential to successful operation, and setting to their respective tasks personnel having individual knowledge thereof.

VII

Rates to Dealers

(51) The rates and charges set out in said Order are not classified as between "dealers," as defined in said Act, and others for whom livestock is bought and sold. In so placing rates and charges to be paid by dealers on the same basis as rates and charges collected from others, the Order invades the power and right of management by this respondent of its own business and sets up rates and charges which would be, in fact, as shown by all the evidence in the record, uncollectible in the amounts so provided, create a duplication of commission charges with respect to the same livestock, and violate the long-established custom and practice of this respondent and of the other respondents in that rates and charges to "dealers" have been approximately 50% in amount of those charged others not registered as "dealers" under the Act. The Secretary, in determining that the rates and charges provided in said Order would yield a fair return to this petitioner, improperly and erroneously evaluated the return so to be received on the basis of the ability of this respondent to apply the same in the future conduct of its business. As shown by all the evidence in the record, this respondent will be unable to apply such Schedule of Rates to sales made on behalf of such "dealers" and will, in fact, fail to realize in respect to such sales the greater revenue therefrom anticipated by the Order of the

Secretary. Therefore, the gross return yield of the Schedule of Rates and Charges provided for in said Order will inevitably be less than the amount of such yield as contemplated by the Order, and fail to offer to or provide for this petitioner a fair return for the actual expenditure of time, effort, and money in the rendition of the stock yard services to which such rates and charges are applied.

VIII

Hazards Not Evaluated

(52) The Secretary failed to give recognition, as a necessary and reasonable operating cost to this petitioner, to certain of the hazards encountered in the transaction of petitioner's business as shown by all of the testimony, and such allowance as is made in said Order as representative of reasonable cost to this petitioner of uninsurable hazards is predicated solely on speculation and guess, and is not fairly representative of expenses normally incident to the existence of such hazards, such hazards originate from the liability of petitioner incident to loss of livestock in custody, damage done to others through escape of livestock in custody, loss incidental to failure of purchasers to pay for livestock purchased, loss uncovered by insurance incident to the guaranty of title by petitioner to the purchase covering livestock sold by petitioner, and loss, incidental expense, and errors entering into accounting processes, and loss incident to bank failures affecting the transmission of proceeds and collection of payment items. The allowance made in Paragraph 163 of said Order to cover uninsurable risks of the character above enumerated was \$.0035 per head for cattle and calves, \$.0014 per head for hogs, and \$.0004 per head for sheep, and is wholly and entirely inadequate to cover such insurable risks and is not based upon evidence in the record, but solely upon a conclusion arbitrarily arrived at without fair consideration of such evidence.

IX

Allowance for Profit

(53) The statement contained in Paragraph 159 of said Order, to the effect that reasonable rates should provide also a per head profit, that is, compensation for management and the carrying of uninsurable risk, is based upon an erroneous conception of law in that fair compensation for management and expenses incident to carrying uninsurable risks does not constitute profit but is expense. The Order, in purporting to allow in the ascertainment of reasonable per head cost, for reasonable profits or margin of profit in respect to selling or buying each species of livestock, and yet failing so to do, is inconsistent and erroneous.

X

Management Expense Understated

(54) The allowance set up in order to ascertain reasonable costs per head in Paragraphs 159 to 163, inclusive, of said Order, to cover compensation for management, is erroneously and improperly arrived at in that the bases stated therefor in Paragraph 159 is the ascertained cost of management of the two co-operative respondent market agencies. Such costs are not comparable under the evidence with the necessary cost incident to the management of respondent's business by reason of the fact that the amounts so stated relate to conditions and expenses of management dissimilar and non-comparable with those sustained by this petitioner. The evidence shows that such co-operative associations are managed by their several Boards of Directors, no allowance for whose time and expenditures is included in the amounts set out, and receive assistance from public employees in connection with matters affecting management, including employees of the Department of Agriculture, both in and out of Washington, D. C., county agents, and others the expense of which is not included in the amount stated.

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XI

Buying Rates

(55) The Schedule of Rates and Charges approved by the Order contains the statement that the rates for buying live stock of the various species should not be in excess of those for selling like species. The effect of this provision of the Tariff on revenue is not ascertained by the Order. As a matter of fact the application of the selling schedules contained in the order to buying operations would increase buying rates by approximately 33 $\frac{1}{3}$ % over the rates now in effect under the schedule filed by this respondent.

Increases Unjustified

(56) The Order devotes four short paragraphs on Page 80 to a discussion of buying costs. These paragraphs contain statements manifestly incorrect and unsound. The statement is made that the costs for buying are the same in amount as shown for selling except as to the items for salesmanship and for interest. (Paragraph 165.) It is common knowledge and undisputed that the buying operation does not involve the physical control of livestock to the same extent as does the selling operation. The relatively greater difficulty of the selling is evidenced by the fact that many buyers, including farmers, employ no agency to represent them. This is seldom the case in selling livestock. The selling agent must grade and sort the livestock and care for it from the time it is unloaded from car

or truck until it passes over the scales. He must supervise it while en route to market. Live stock bought is delivered to the buyer at the scales and the employes of the stockyards company place the live stock in the pens of the buyer or see to the loading out under his supervision. In selling this work is done by the commission firms. It is axiomatic that to sell is more difficult than to buy—when you have the purchase price. The Order states in Paragraph 166 that a competent buyer can buy as many animals of a species as an equally competent salesman can sell. While there is no direct testimony upon this point in the record the statement made is unsound only in understating the proposition. A competent buyer can undoubtedly buy accurately and efficiently with much greater rapidity than a salesman can sell. The buying costs as reflected by the cost study of respondent's account in respect to cattle and calves were \$.4259 per head; in respect to hogs, \$.0955 per head; and in respect to sheep \$.0401 per head. This cost as to cattle is approximately two-thirds the selling cost; as to hogs approximately one-fourth of the selling cost; and as to sheep approximately 45% of the selling cost. It is true that capital requirements in buying are greater, and that losses from refused purchases sometimes occur, but these items constitute a small part of total costs either in selling or buying. The Order ignores this cost differential. It makes no reference to the testimony of many witnesses to the effect that it was the well established policy of the market to employ every possible means of securing the competition of additional buyers at the market in the interest of those who consign their livestock to the market for sale.

148 Increases in Buying Rates Not Realizable Without
 Injury to Market

(57) The increased buying rates allowed by the Order are merely "paper" rates so far as yielding additional revenue to this respondent is concerned. The record shows that over a long period of time the current buying rates have been in effect and have borne a well established relationship to selling rates.

Chicago Buying Rates Lower

(58) It appears that although selling rates are much lower at Kansas City, buying charges are already higher at Kansas City than at Chicago. The rates provided for in this Order, if appealed, would create the anomalous condition of selling rates approximately 40% less than those in effect at Chicago, and buying rates approximately 40% higher than those at Chicago. Such a rate adjustment overturning a relationship between selling and buying rates that has existed not only at Kansas City but upon other markets for many years, would tend to obstruct the flow of livestock through the Kansas City Stock Yards which the Act seeks to protect and increase, and would be discriminatory and prejudicial.

Antagonistic To Sellers' Interests

(59) The principle of rate-making embodied in this section of the Order, unjustified as it is from the standpoint of relative costs, impossible of effective application on account of competitive conditions, proceeds in defiance of sound and well-settled marketing policies and in direct antagonism to the true interests of producers of livestock.

Unit Cost Integrations Contained in Order Are Inaccurate and Inconsistent with Sound Cost-Finding Principles

(60) The Order, in fixing the alleged reasonable costs per head for selling and buying, not only ignored and refused to give weight or effect to the costs found and testified to by the respondent's accountant, but also ignored and refused to give weight or effect to the unit costs found to exist by the government's chief accountant. That is evident from the comparative unit-costs shown in the table below:

Species	Gov't chief accountant	Respondent's accountant	Fixed in the order
Cattle and Calves, per head.....	56.71c	61.64c	44.79c
Hogs, per head.....	25.10c	33.87c	18.10c
Sheep, per head.....	08.02c	08.83c	05.80c

(61) The differences in the findings of the respective accountants is largely attributable to the difference in treatment and allowance for compensation of owner-workers' services, and may be wholly reconciled and explained. The unit costs fixed in the Order, however, have no traceable connection with the findings of the accountants which were so laboriously and expensively arrived at, and rest solely on speculation and guess-work and imported considerations which are altogether apart and foreign to the record in this case. The findings of the accountants reflect the history of the actual experience of the firms insofar as it is recorded, as determined by audits made by government forces. With respect to the sacrifice value of the personal services rendered by the owner-workers the facts are not of record. The government accountant used in lieu thereof the drawing accounts, the profit-takings, or some other indication (and in cases allowed nothing at all) to represent such owners' compensation, while the respondent's accountant used the independent witnesses' appraisalment of the fair worth of their services. The Order, however, gives no effect to and disregards the evidence of record in this and other particulars and sets up function unit-costs, allegedly reasonable, but which in no instance have a counterpart in the actual experience of any of the 61 firms operating on the Kansas City market. These theoretical and imaginary unit-costs fixed by the Order, when applied to the 1931 volume of all firms save the two co-

operatives, produce an aggregate suppositious handling cost, including return on investment, etc., which is \$856,737, or 44.4% less than the aggregate costs and charges found by the respondent's accountant, and \$633,132, or 37.11% less than the aggregate expenses found by the government's chief accountant, whose figures include nothing for return on invested capital or for profit allowance. These markedly unusual and unwarranted differences reflected by the service costs and charges conceived and set forth in the order are clearly traceable to violence done to the well established and universally accepted principles of cost-finding, and to the recognition of considerations wholly foreign to the record. By denying the true incidence of the cost of owner and employee workers' time devoted to yarding service, deleting the same from the unit-costs fixed for that function on the ground that it is covered by the allowance for selling-buying service, the truly reasonable costs of the yarding function have been grossly understated. When fixing the unit allowance for the selling-buying function, the actual expenses have been ignored entirely, an arbitrary limit being observed in fixing the unit-cost of that function. By this process the Order fails to make adequate allowance anywhere for the actual costs of yarding performed by workers whose expense was joint as between selling-buying and yarding functions. An hypothetical treatment of so-called business getting and maintenance expenses, and a wholly mistaken conception of its true character and legitimacy, has resulted in an arbitrary allowance expressed in a unit cost which is based solely on opinion and in complete disregard of the facts of record.

(62) Species costs, as found by the accountants, segregate themselves with a fair degree of accuracy. The functional costs within the species costs, however, do not segregate themselves in actual operations, the same personnel and the same facilities being used very largely to perform all the functions. Species functional costs are therefore difficult to arrive at and impossible of reasonably accurate determination. They can be found only with the aid of arbitrary bases of apportionment, the most appropriate of which may actually vary widely from the facts. Erroneous conclusions reached in this order are occasioned chiefly, perhaps, by the procedure of disintegrating the species costs and reintegrating the allowed head rate by combining modified species functional costs. Under this procedure hypothesis rests upon hypothesis, and conjecture is piled upon conjecture, to the end that the final result reached bears no resemblance whatever to the facts in the situation. The process employed serves to bring about an unintentional magnification of errors, no doubt substantial but of unknown degree, which are inherent in the original functional cost separations.

(63) Another penalty is unintentionally inflicted upon those whose livelihood depends upon the fairness of the rates being fixed, as a result of the integrating process employed under the conditions referred to. After making arbitrary eliminations and reductions in the costs as heretofore mentioned, the pared down functional costs are

them considered separately, and neither the total species costs, nor the total operating costs are allowed to influence the integrated species unit costs stated in the Order. Notwithstanding, however, the market is a concrete whole, and each individual agency is obliged to handle all different kinds and sizes of consignments which may be offered, and to operate as an independent unit. For example, selling costs are found to be unusually low in the case of agencies which have relatively high unit costs for "business getting and maintenance." But when functional costs are considered separately, the connection between a low selling cost and a relatively high business getting cost is lost sight of, and cannot and has not received consideration. Neither the agencies handling average volume, nor any other agency, finds its functional costs within the range of the unit costs denominated as reasonable in the Order. Nor do the unit total costs of any one agency come within the limits of the unit total costs stated in the Order as reasonable.

(64) The disparities and discrepancies so conspicuously present in this instance are the common and almost inevitable results of pursuing a method of fabricating so-called unit costs out of computations which relate, not to the actualities and the practical aspects of the situation, but to conjecture erected upon conjecture. The method pursued strains for refinements and nice exactions and differentiations which are impossible of attainment if the facts alone be dealt with.

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XIII

Confiscatory Effect of the Rates Prescribed

(65) The rates prescribed by the Order are confiscatory, discriminatory, prejudicial, and unlawful. The fact that they are confiscatory is plainly evidenced by the government's findings as to operating costs, which do not reflect all of the expense which respondent claims attaches to its operations.

(66) In the case of the eleven agencies referred to at page 39 of the Order as having handled more than fifty percent of the total market volume in 1931, an application of the prescribed rates to the transactions actually handled by such agencies throughout the year discloses that the revenue yield of such rates would be only \$7,920.37 more than the actual and admitted costs of providing the service exclusive of any allowance whatever for personal services rendered by the owners, exclusive of any return whatsoever upon the invested capital, exclusive of any allowances whatsoever for bad debts, for losses resulting from refused purchases, and for reserves to protect the uninsurable hazards to which the businesses are constantly subjected.

(67) In the case of cattle and calves, the rates would only return the bare operating expenses found by the government's chief accountant exclusive of the items aforementioned, plus \$6,391.21. In the case of swine, the rate would yield \$980.94 less than the bare operat-

ing expenses so found. In the case of sheep, the rates would yield only \$2,510.10 more than the bare operating expenses so found. The net yield of \$7,920.37 from all species over bare expenses would lack \$20,640.28 of meeting the order's allowance for return on investment and would allow nothing whatsoever for compensating the owners for their personal services.

(68) The eleven agencies referred to are Agency Numbers 73, 51, 84, 82, 83, 36, 46, 10, 63, 59, and 54, being the eleven out of sixty-one agencies operating on the market which enjoyed the largest patronage. Collectively they handled 49.96% of all cattle and calves, 59.42% of the swine, and 56.44% of the sheep sold and bought as represented by the number of head, and 54.32% of the total number of equivalent carloads, the unit of measurement used in the Order. Among the eleven are the two co-operative agencies, numbers 10 and 36.

(69) The eleven agencies to point are those of large volume, being of the class, according to the statement in the Order appearing on page 53, whose cost experience may not be taken as criteria for rate-making purposes lest injustice be done to other firms handling volume of lesser magnitude, and, therefore, at higher unit costs.

(70) In the case of these eleven agencies, the gross yield of the prescribed rates is less than one per cent more than the bare operating expenses found by the government's accountant, exclusive of 152 the items aforementioned. If we reckon the allowance deleted from the government expenses for owners' services, amounting to \$147,162.80, and return on investment on the basis of the order's allowance, which aggregates \$28,560.65 for the eleven agencies, the degree in which the rates are manifestly and undisputably confiscatory may be set at the sum of these two items less the \$7,920.37 returned in excess of bare operating expenses, or \$167,803.08 for the eleven firms. This sum is 17.3% of the government's own findings as to what the rates should cover.

(71) Taking the twenty-three agencies, inclusive of the eleven just referred to, which are cited in the Order at page 39 as having handled more than 75% of the market volume as measured by equivalent carloads, it likewise appears by applying the prescribed rates to the transactions actually handled throughout the year 1931 that such rates are confiscatory as applied to such firms individually and collectively. These particular twenty-three of the sixty-one agencies operating on the market are those which individually handle the largest volume and unquestionably operate with more than the average efficiency and economy of expenditures. Collectively such agencies handled 76.55% of all cattle and calves, 77.14% of all swine, 60.24% of all sheep, and 70.99% of all animals sold and bought on the market during 1931, as measured by the number of head, and 75.3% of the total volume of all species as measured by the equivalent carload.

(72) Again using the operating expenses found by the government's chief accountant as they appear of record, which are exclusive

of any return whatever upon invested capital, and deleting therefrom the amounts included to represent compensation for owner's services rendered, the gross revenue produced by the prescribed rates would be only \$25,025.38 more than the government's findings as to bare operating expenses of such twenty-three agencies. This \$25,025.38 is only 60% of the allowed return on the investment of such firms, thus providing no compensation whatsoever for owners' services rendered. As shown by the government's own evidence of record, the measure of confiscation as respects these twenty-three firms is indicated by the sum of the allowances for owner's services, as shown by its chief accountant, and the return on investment allowed in the order, less the \$25,025.38 which the rate yield would contribute thereto, or \$269,565.02. This deficiency is 18.7% of the total operating expenses found by the government's chief accountant plus the allowance for return on investment provided by the Order, as respects the twenty-three agencies.

(73) Considering the fifty-nine firms operating on the market, exclusive of the two co-operative agencies, the yield of the prescribed rates over bare operating expenses, exclusive of any compensation whatsoever to owners for services rendered, and exclusive of any return whatsoever on capital invested, would be \$115,253.87. For such firms the allowance for return on investment provided in the Order would be \$49,073.64. Deducting that amount from the \$115,253.87 referred to would leave \$66,180.23 to compensate the owners for their services, which would average \$486.62 per owner per annum.

153 (74) Considering the two co-operative agencies, and reckoning the yield of the prescribed rates on the basis of the average yield per head for each species, as developed by applying the prescribed rates to the actual transactions of the fifty-nine firms for the entire year 1931, the showing for the market as a whole is further impoverished. On that basis, the rates would produce \$78,125.09 over the government's findings as to bare operating expenses. After providing for return on investment as allowed in the order, in the aggregate sum of \$54,394.81, the remainder of the rate yield available for the compensation of owner-workers would be only \$23,730.28, an average of \$174.50 per owner-worker per annum, or the equivalent of 48 cents per man per day.

(75) Based upon the government's own findings as to the actual and admitted expense and cost of operations, exclusive of any allowance whatsoever for owners' services, and exclusive of any return whatsoever on capital invested and used in the conduct of the business, the prescribed rates are confiscatory, discriminatory, prejudicial, and unlawful as they would apply to this respondent. This is proven to be so by applying such rates to each and all of the transactions actually handled by this respondent during the year 1931. The net sum, if any, which would remain after defraying the bare operating expenses for that year (as disclosed by the government's audit and set forth in the exhibits of record, introduced by its chief accountant)

to provide the Order's allowance for return on invested capital, and to compensate the owner-workers for their personal services rendered, is shown on the underscored line of the table next following, together with the amount of the Order's allowance for return on invested capital, the residue thereafter available for the compensation of the owner(s), and the average compensation per owner, if any, per annum which such amount represents. The amount (if any) so appearing as compensation available to the owner(s) is in fact exaggerated, because the actual expense and cost of conducting the business of the respondent in 1931 was materially in excess of the findings of the government's accountant, as shown by the testimony and exhibits of the respondent's own accountant witness. The government's own findings as to operating expenses and the cost worth of owner-worker's services is used here without prejudice and without any abatement of respondent's contention as to their inadequacy and unfairness, because their use removes all occasion for dispute concerning the amount of deductions from the gross yield of the prescribed rates, and resolves all contentions with respect thereto to the disadvantage of the respondent.

154 REVENUE PRODUCT OF PRESCRIBED RATES WHICH WOULD BE AVAILABLE FOR COMPENSATION OF OWNERS FOR SERVICES RENDERED, AND FOR RETURN ON CAPITAL INVESTED

[Deficits appear in italics]

Agency No.	Revenue from rates available to compensate owner for services and return on investment	Less return on investment as allowed in the order	Remainder, if any, available to compensate owner for services rendered	Average compensation available per owner per annum
1.	\$716.02	\$173.10	\$542.92	\$542.92
4.	3,387.80	610.89	None	None
5.	1,103.12	863.33	356.79	356.79
6.	3,285.62	299.68	2,985.94	1,492.97
7.	4,331.33	529.66	3,801.67	1,900.84
9.	285.78	182.45	None	None
11.	1,468.74	42.50	None	None
12.	11,140.65	1,229.86	None	None
13.	1,352.72	1,267.60	85.12	28.37
14.	684.70	855.57	None	None
15.	4,451.21	385.36	4,065.85	2,032.93
16.	4,989.58	465.87	4,523.71	1,507.90
17.	3,360.76	221.16	3,139.60	1,579.80
18.	9,945.45	980.81	8,964.65	2,241.16
19.	1,899.83	226.04	None	None
20.	1,870.98	514.38	None	None
23.	1,044.34	538.33	506.01	506.01
25.	1,658.65	948.79	None	None
26.	879.79	607.90	271.89	135.90
29.	657.74	474.98	82.76	27.59
30.	2,850.25	378.09	2,472.16	1,236.08
33.	441.11	37.23	403.88	403.88
34.	2,462.63	898.31	1,564.32	1,564.32
35.	45.64	1,185.13	None	None
37.	435.86	23.36	402.50	402.50
42.	7,406.58	1,028.39	6,308.19	2,102.72
43.	3,422.31	561.92	2,860.39	2,860.39
44.	9,564.85	1,069.54	8,495.29	4,247.65
46.	8,247.90	2,626.98	5,620.92	1,124.18
48.	6,874.05	678.76	6,195.29	2,065.10
51.	12,575.26	1,479.48	11,095.78	11,095.78
52.	19.06	386.12	None	None
53.	2,681.73	517.45	2,164.08	1,082.04
54.	3,359.54	5,308.63	None	None
55.	5,525.08	1,060.02	4,445.06	2,222.53

REVENUE PRODUCT OF PRESCRIBED RATES WHICH WOULD BE AVAILABLE FOR COMPENSATION OF OWNERS FOR SERVICES RENDERED, AND FOR RETURN ON CAPITAL INVESTED—Continued

Agency No.	Revenue from rates available to compensate owner for services and return on investment	Less return on investment as allowed in the order	Remainder, if any, available to compensate owner for services rendered	Average compensation available per owner per annum
56.....	\$5,769.37	\$357.91	\$5,181.46	\$2,590.73
59.....	1,111.55	3,788.54	None	None
60.....	4,194.96	439.23	3,745.13	624.19
61.....	615.45	232.67	382.78	382.78
62.....	686.38	596.01	None	None
63.....	2,419.08	3,159.28	None	None
65.....	1,698.65	666.62	None	None
66.....	1,031.31	61.13	970.18	970.18
67.....	1,328.11	51.23	1,276.88	1,276.88
70.....	1,694.28	699.94	None	None
71.....	2,693.37	1,078.49	None	None
72.....	268.69	43.68	225.01	225.01
73.....	4,739.11	1,432.30	None	None
74.....	253.18	149.13	None	None
75.....	620.24	422.59	None	None
76.....	1,654.37	210.90	1,443.47	1,443.47
77.....	3,736.97	429.22	3,307.75	1,102.68
78.....	770.78	209.19	None	None
79.....	915.22	200.27	714.95	714.95
82.....	1,976.60	1,875.71	101.09	20.22
83.....	22,273.40	1,869.68	20,403.72	4,080.74
84.....	4,543.81	1,608.88	2,844.93	948.31
87.....	2,054.46	465.56	1,648.90	1,648.90
88.....	468.50	45.20	None	None

The failure to grant the request of this respondent for a separate hearing upon the issues presented by the Order of Inquiry; the refusal of the request made to the Examiner that a tentative report on the evidence be prepared by the Examiner and that oral argument before the Secretary of Agriculture be had upon the evidence and the conclusions expressed in such report and the delegation to others of powers and authorities involving the exercise of discretion solely vested in the Secretary of Agriculture under the law, have served to deny to this respondent the full hearing to which respondent is entitled, provided for in the Packers and Stockyards Act, 1921, and as required under such circumstances by the laws and Constitution of the United States of America.

Wherefore, this respondent respectfully prays that an order be entered herein withdrawing and for naught holding said Order purporting to be made by the Secretary of Agriculture as of June 14, 1933, and re-opening the above entitled proceeding by re-investigation of the matters and things in the Notice and Order of Inquiry referred to, and that this proceeding be set down for further hearing in order that a proper determination may be had after full, fair, and adequate hearings and upon the evidence of the matters and things in said Notice and Order of Inquiry brought in issue.

FRED O. MORGAN COMMISSION COMPANY,
By JOHN B. GAG, Attorney.

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UNITED STATES VS. F. O. MORGAN

Comparisons of Unit-Costs per Order of June 14, 1933, and Total Costs as Found by Government Accountants and as Claimed by Respondents (59 Firms) For the Test Year 1931

Selling & buying No. of head 59 firms	Allowances per order June 1933		Total costs as claimed		Order's allowances in excess (excesses shown*)		Differences between Gov't and resp's costs (Gov't excess*)
	Rate per head	Amount	By Government Exhibit	Respondents	Of Gov't costs	Of Resp's costs	
Cattle & Calves: Salesmanship & Buying Yarding Salaries Yarding Expenses Office Salaries Office Expenses Business Getting & Mice Adm & Genl Expenses Insurance (Risk Expense) Return on Investment	2,284,297	\$214,992.15 171,315.53 31,978.90 119,920.87 68,526.61 102,789.32 75,378.83 15,589.45 34,283.11	\$351,248.83 221,737.54 29,299.39 136,767.01 71,533.40 326,303.91 75,366.43 30,433.98 29,730.01	\$410,161.43 236,083.76 29,349.00 126,222.46 74,004.24 296,248.94 81,373.82 24,010.06 44,482.54	\$36,256.68 50,422.01 *2,700.51 16,846.14 3,006.49 223,514.59 *12.40 14,444.53 *7,533.10	\$95,169.28 64,768.23 *2,629.90 6,311.59 5,478.03 193,459.62 8,094.99 10,189.43 17,722.53	\$58,912.60 14,346.22 79.61 *10,534.55 2,471.54 *30,054.97 0,007.39 *6,423.92 17,722.53
		\$935,154.77 59,947.25 *7,994.72	\$1,290,390.20 54,082.62	\$1,321,943.25 86,160.47	\$334,235.43 *25,804.83 *7,994.72	\$380,761.88 6,213.22 *7,994.72	\$52,536.05 32,077.85 *
		\$1,023,096.74	\$1,323,472.82	\$1,408,076.72	\$500,376.95	\$584,980.38	\$84,603.90
	1,045,048	\$26,890.19 31,351.44 6,276.28 31,351.44 18,288.34 18,810.86 20,990.96 2,612.62 7,315.34	\$56,021.73 62,975.60 2,274.92 36,958.26 19,426.59 52,043.54 18,800.21 5,508.06 5,707.31	\$63,547.69 65,297.42 2,247.49 41,332.72 26,110.38 101,098.13 19,240.80 4,971.47 10,444.59	\$10,731.51 31,024.16 *3,995.37 5,606.82 1,138.25 33,232.68 *2,100.75 *2,895.43 *1,608.08	\$25,657.50 33,945.98 *27.43 9,981.28 7,822.04 82,197.27 *1,600.10 2,358.95 3,129.25	\$0,925.96 2,321.82 *27.43 4,374.46 6,083.79 48,994.59 *1,440.65 *536.39 4,737.26
		\$173,791.48 13,899.14 1,463.07	\$260,310.22 9,121.51	\$264,200.75 19,777.10	\$96,524.74 *4,777.63 *1,463.07	\$100,400.27 5,877.96 *1,463.07	\$73,884.53 10,655.59 *
		\$180,133.69	\$260,437.73	\$338,977.85	\$80,284.04	\$164,824.16	\$84,540.12
Hogs: Salesmanship & Buying Yarding Salaries Yarding Expenses Office Salaries Office Expenses Business Getting & Mice Adm & Genl Expenses Insurance (Risk Expense) Return on Investment		1665 0133 0014					
Total "Costs" Profit Management Uninsurable Risks							
Total Cost + Profit							

Sheet:	1, 899, 008	\$0, 0140	\$26, 552.51	\$28, 109.12	\$33, 323.47	*433.3, 99	\$6, 770.96	\$7, 124.05
Salesmanship & Buying			15, 172.86	14, 765.06	13, 171.40	*407.20	228.54	*52.18
Varying Salaries			758.64	8, 726.11	8, 073.93	7, 997.47	7, 915.20	8, 113.36
Varying Expenses			18, 966.08	16, 601.47	19, 715.03	*2, 304.61	748.65	1, 006.12
Office Salaries			9, 453.04	8, 850.50	9, 866.62	*632.54	373.36	4, 362.45
Office Expenses			11, 189.99	49, 522.74	53, 885.19	38, 332.75	42, 605.20	*613.02
Business, Printing & Mfrs			9, 483.04	6, 126.72	3, 512.70	*357.32	*970.34	*1, 712.52
Adm. & Genl. Expenses			2, 465.59	5, 944.25	3, 331.73	2, 578.66	866.14	*1, 006.10
Insurance (Risk Expense)			7, 586.43	5, 918.37	4, 822.08	*1, 668.16	*2, 764.35	
Return on Investment								
Total "Costs"			\$101, 658.18	\$144, 754.14	\$157, 592.15	\$43, 095.96	\$55, 935.97	\$12, 838.07
Profit			7, 594.43	6, 600.94	9, 928.78	*925.49	*2, 342.35	3, 267.84
Uninsurable Risks			758.64			*708.64		
Total Costs + Profit			\$110, 003.25	\$151, 415.08	\$167, 520.93	\$41, 411.83	\$57, 517.68	\$16, 105.85
All species:								
Salesmanship & Buying			\$178, 434.85	\$434, 099.98	\$497, 032.59	\$55, 635.13	\$128, 597.74	\$72, 952.61
Varying Salaries			217, 839.83	299, 478.80	316, 852.58	81, 038.97	99, 012.75	17, 373.78
Varying Expenses			39, 097.83	40, 270.42	1, 262.59	1, 262.59	1, 262.59	
Office Salaries			20, 234.39	190, 326.74	197, 280.21	20, 088.35	17, 041.82	*3, 016.53
Office Expenses			96, 297.99	96, 810.19	109, 971.24	3, 512.20	318, 352.09	10, 161.05
Business, Printing & Mfrs			132, 799.17	427, 870.19	451, 142.26	295, 080.02	318, 352.09	23, 272.07
Adm. & Genl. Expenses			105, 762.83	103, 292.36	109, 127.38	*2, 470.47	3, 364.55	6, 835.02
Insurance (Risk Expense)			21, 097.06	40, 986.29	32, 313.26	19, 918.63	11, 245.60	*8, 673.03
Return on Investment			49, 161.88	38, 355.59	59, 719.21	*10, 809.29	10, 554.33	21, 363.62
Total "Costs"			\$1, 201, 601.43	\$1, 674, 460.56	\$1, 813, 709.15	\$403, 856.13	\$603, 104.72	\$130, 248.59
Profit			101, 432.82	69, 865.07	115, 896.35	*31, 567.75	14, 433.53	46, 001.28
Uninsurable Risks			10, 216.43			*10, 216.43	*10, 216.43	
Total Costs + Profit			\$1, 322, 253.68	\$1, 744, 325.63	\$1, 929, 575.50	\$422, 071.95	\$607, 321.82	\$185, 249.87

In United States District Court

Statement as to Petitions Filed

The petitions filed in the several remaining cases being Docket Nos. in Equity Nos. 2329-2378, Inc., are identical with the petition above set out and filed in Case No. 2828, except in respect to the name of the individual plaintiff (or plaintiffs) and the amounts in dollars or percentages appearing in Section VIII of each of the petitions applicable under the allegations to the particular plaintiff in the specific suit. The name or names of the plaintiff (or plaintiffs), the number of the suit, and the specific amounts set forth in the order of their appearance in Section VIII of each petition are for the purpose of brevity condensed and set forth in the following table:

Docket No.	Name of plaintiff	Amount appearing in first paragraph of sub-section (a) of section VIII		Amounts appearing serially in second paragraph of sub-section (a) of section VIII					Amounts appearing serially in second paragraph of sub-section (b) of section VIII
		(1)	(2)	(3)	(4)	(5)	(6)	(7)	
2329	J. M. Radland, W. B. Storts and W. L. Burruk, partners d/b as Radland, Storts & Burruk, L. S. Comm. Co.	\$12,257.72	8%	13%	15.50%	0.53%	13.56%	\$—	\$6,500.00
2330	H. H. Klecker, d/b as Hinkle Klecker Sheep Com. Co.	5,058.70	19%	76%	—%	—%	13.91%	\$350.79	6,000.00
2331	R. H. Lewis and S. H. Flournoy, Partners d/b as Lewis-Flournoy Livestock Com. Co.	6,824.37	17%	11%	12.98%	2.56%	12.04%	1,492.97	7,000.00
2332	Grover E. Maxwell and Ben J. Furnish, Partners d/b as Maxwell-Furnish Livestock Com. Co.	4,628.73	—%	—%	11.36%	32%	6.14%	1,000.84	8,000.00
2333	John M. Nichols, d/b as John M. Nichols L. S. Comm. Co.	6,119.03	—%	—%	11.75%	1.82%	5.96%	None	4,000.00
2334	Bowles Livestock Com. Co., a Corporation.	13,820.60	11%	18%	17.78%	1.95%	8.81%	None	—
2335	Cridder Brothers Com. Co., a Corporation.	14,340.07	6%	14%	17.92%	2.46%	9.42%	28.37	12,400.00
2336	Chas. Lixop Commission Co., a Corporation	14,311.67	12%	26%	19.56%	5.4%	7.38%	None	10,800.00
2337	E. W. Elliott & R. K. Swain, Partners d/b as Elliott, Swain & Company...	4,443.84	16%	1%	13.48%	70%	8.68%	2,932.93	7,200.00

2338	Farrar, Davis & Campbell Livestock Com. Co., a Corp'n.	7,316.00	22%	8%	14.52%	16%	6.30%	1,507.90	10,000.00
2339	W. G. Gladish, d/b as Gladish Livestock Com. Co.	4,904.47	15%	9%	12.57%	90%	11.02%	1,576.80	7,000.00
2340	O. C. Haggart, John H. Wilson, and Glenn Haggart, Partners d/b as Haggart-Wilson L. S. Com. Co.	11,339.08	9%	8%	13.19%	5.89%	5.48%	2,241.10	15,150.00
2341	Wm. M. Liegett, d/b as K. C. Livestock Com. Co.	10,403.20	6%	10%	15.09%	3.03%	6.07%	None	6,000.00
2342	Fern O. Sanders, d/b as Fern O. Sanders L. S. Com. Co.	9,494.08	6%	23%	13.7%	1.15%	9.25%	505.01	6,000.00
2343	Stuart-Robinson-Hoover Company, a Corp'n	26,883.86	16%	24%	14.90%	2.30%	12.91%	4,308.63	22,300.00
2344	R. W. Wester & Joseph P. Smith, Partners, d/b as Wester Brothers & Smith Commission Company	7,408.63	120%	9%	14.97%	54%	8.67%	135.00	8,100.00
2345	Stagner, Pieronnet & Willis L. S. Com. Co., a Corp'n.	9,535.85	1%	6%	13.47%	1.16%	9.49%	27.59	10,400.00
2346	Geo. S. Tamblin, d/b as Tamblin Com. Co.	5,930.72	1%	6%	14.49%	53%	6.60%	1,240.58	8,500.00
2347	Henry F. Carnes, d/b as H. F. Carnes L. S. Com. Co.	1,570.66	24%	19%	15.89%	2.96%	2.34%	403.88	1,600.00
2348	Warren Cummings, d/b as Warren Cummings L. S. Com. Co.	12,082.01	6%	16%	11.71%	5.04%	8.44%	1,564.32	6,000.00
2349	Drummond-Standish Com. Co., a Corp'n.	27,082.12	152%	28%	15.04%	1.25%	10.87%	None	29,500.00
2350	Link Fishkin, d/b as Link Fishkin L. S. Com. Co.	4,048.03	—%	—%	11.68%	—%	5.36%	402.80	750.00
2351	H. E. Long, Robt. B. Perry, and B. W. Perry, Partners d/b as Long-Perry Livestock Com. Co.	71,043.17	6%	14%	18.07%	2.28%	7.89%	2,102.73	14,000.00
2352	L. E. Tice, d/b as Knight & Tice Sheep Com. Co.	3,947.78	14%	31%	—%	—%	11.06%	2,860.39	5,000.00
2353	Chas. F. Vieregg & Robt. H. Stover, Partners, d/b as W. M. Lellett Sheep Com. Co.	2,162.76	13%	11%	—%	—%	10.48%	4,247.65	10,000.00
2354	National Livestock Com. Co., a Corp'n.	51,951.86	18%	17%	13.36%	3.30%	10.90%	1,124.18	36,000.00
2355	Bryant Poole, D. L. Dempsey & James Rutherford, Partners doing business as Poole-Dempsey-Rutherford L. S. Com. Co.	8,623.74	0%	22%	13.62%	3.93%	6.38%	2,065.10	12,500.00
2356	Harry Kennaley, d/b as Harry Kennaley Com. Co.	5,044.28	1%	25%	11.38%	0.97%	8.64%	10,000.00	10,000.00
2357	Flrke-Martin L. S. Com. Co., a Corporation.	7,880.08	1%	25%	10.92%	3.97%	6.10%	10,630.04	8,200.00
2358	John Clay, F. H. Connor, Alan F. Wilson & Chas. G. Smith, Partners d/b as John Clay & Company	53,222.32	18%	8%	16.36%	4.31%	13.33%	None	10,000.00
2359	Ralph W. Wright & Wm. N. Baucus, Partners, d/b as Wright & Baucus Livestock Com. Co.	23,460.77	5%	14%	12.93%	4.42%	2.20%	2,222.53	13,600.00
2360	Swift & Henry Livestock Com. Co., a Corp'n	51,677.18	14%	14%	13.93%	2.91%	12.68%	None	41,800.00
2361	L. Knott, Henry F. Thels, F. W. Thels, and A. C. Thels, Partners d/b as H. Thels & Sons	14,024.77	8%	17%	13.96%	0.9%	10.48%	624.19	16,500.00
2362	Hann Knighton, d/b as Hann Knighton L. S. Com. Co.	3,188.17	19%	11%	10.11%	8.2%	6.38%	382.78	3,200.00
2363	J. M. Laird and G. A. Laird, Partners d/b as Laird Brothers Livestock Com. Co.	11,214.34	150%	13%	14.52%	57%	7.67%	None	9,000.00
2364	Marlin, Bromquist & Lee Com. Co., a Corp'n	65,826.05	21%	7%	15.33%	6.33%	9.07%	None	42,200.00
2365	H. M. Baker, W. C. Bradshaw, Barney Metz and Louise M. Moffett, Partners d/b as Moffett Livestock Com. Co.	13,644.95	13%	16%	13.24%	7.80%	11.61%	None	11,000.00
2366	Jay D. McCormick, d/b as Jay D. McCormick L. S. Com. Co.	1,965.08	17%	5%	12.76%	8.2%	9.30%	970.18	2,000.00
2367	W. C. Kile, d/b as Kile Com. Co.	10,902.13	20%	7%	13.25%	4.11%	10.75%	None	6,000.00
2368	Ryan-Robinson Com. Co., a Corp'n.	24,414.25	0	9%	14.04%	5.28%	9.50%	None	18,050.00
2369	Ben L. Welsh, d/b as Welsh Livestock Com. Co.	1,577.38	10%	—%	16.73%	4	6.45%	225.01	1,500.00
2370	Witherspoon Livestock Com. Co., a Corp'n.	2,759.34	14%	19%	16.63%	11.41%	9.62%	None	18,283.80
2371	W. E. Curtis, d/b as W. E. Curtis & Company	3,908.64	29%	14%	15.07%	1.56%	9.84%	None	3,000.00
2372	Norman B. Greer, d/b as Greer & Company	8,098.28	10%	21%	11.93%	3.97%	10.40%	1,443.47	3,000.00
2373	Inman-Hutton Livestock Com. Co., a Corp'n.	9,023.85	38%	33%	14.33%	5.21%	7.62%	1,192.58	11,000.00
2374	Water O. Land & John E. Mase, Partners, d/b as Walter O. Land Livestock Com. Co.	6,241.89	5%	26%	13.51%	8.73%	8.06%	None	3,000.00

See footnotes at end table.

Docket No.	Name of plaintiff	Amounts appearing serially in second paragraph of sub-section (a) of section VIII						Amounts appearing serially in second paragraph of sub-section (b) of section VIII	
		(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
2275	Less White, d/b as Less White Livestock Com. Co.	\$3,900.86	1 12%	3%	13.11%	3.12%	9.58%	\$714.95	\$4,000.00
2276	Wilson Egan & Co., a Corporation	28,728.01	10%	23%	16.14%	4.36%	6.28%	26.22	20,000.00
2277	Burlington Livestock Com. Co., a Corpn.	45,631.08	51%	25%	15.59%	3.65%	7.33%	4,080.74	24,083.56
2278	Cassidy Southwestern Com. Co., a Corpn.	20,579.93	—%	—%	13.81%	2.39%	11.46%	948.31	16,000.00

Legend

- (1) The figures in this column are alleged in the petition to represent the amount by which the gross revenue which would have been received by petitioner in the year 1931 if the Schedule of Rates and Charges prescribed by the Order had been in force and effect would have been less than the total calculable costs incurred by petitioner in the rendition of stockyard services (Res. Exh. 207).
- (2) Alleged to be the amount in percentage by which the gross yield to individual petitioner of charges actually collected in 1932 was less than the gross yield of charges collected in 1931.
- (3) Alleged amount in percentage by which the gross revenue of petitioner was less for the first five months of 1933 than during the first five months of 1932.
- (4) Alleged to represent in percentage the amount by which the Schedule of Rates and Charges ordered by the Secretary if applied to the business of individual petitioner would reduce revenues in respect to cattle and calves.
- (5) Alleged to be the amount in percentage by which the Schedule of Rates and Charges ordered by the Secretary if applied to the business of petitioner would reduce revenues in respect to hogs.
- (6) Alleged to be representative in percentage of amount by which the Schedule of Rates and Charges ordered by the Secretary if applied to the business of the individual petitioner would reduce revenues in respect to sheep.
- (7) Alleged to represent the total compensation for personal services rendered by the owners of petitioner agency if the rates and charges ordered by the Secretary had been in effect in 1931 and petitioner's incurred costs exclusive of any compensation to owners for personal services, as found by Government's Chief Accountant in Cost Study introduced in evidence (Res. Exh. 115).
- (8) Alleged to be representative of the reasonable value of the personal services rendered by the owner or owners of petitioner agency as shown by evidence submitted on behalf of the appellants. The number of owners in respect to each agency is set out in the evidence and in the individual petitions and the amount given includes all owners actually employed in the rendition of the service in connection with the operations of the individual petitioner in the year 1931.
- † Indicates gain instead of loss.

In United States District Court

In Equity. No. 2328

[Title omitted.]

Temporary restraining order

Filed July 22, 1933

Now on this 22nd day of July, 1933, comes the petitioner as plaintiff herein, and presents to the undersigned Judges of this Court a verified petition wherein it is prayed that an order staying and suspending the enforcement, operation and execution of the Order of June 14, 1933, of the defendant Secretary of Agriculture issue against the defendants, and each of them, as in said petition prayed.

And the Court, being duly advised in the premises, finds that notice of application for such Restraining Order has been duly given to the defendants in accordance with law and that immediate and irreparable injury and damage will result to petitioner unless such Order shall issue according to the prayer of the Petition, and that petitioner is entitled to a temporary restraining or Stay Order as prayed, in this:

That petitioner has an established business as a market agency, registered under the Packers and Stockyards Act, 1921, engaged in the sale and purchase of livestock for others at the Kansas City Stock Yards, in Kansas City, Missouri, and that, if such temporary restraining and stay order suspending the enforcement of said Order of the Secretary of Agriculture is not granted, the defendants will, before the hearing upon the application for temporary injunction as prayed in said Petition, have it within their power, and they will, proceed to enforce the penalties provided for violation of said Order by the Packers and Stockyards Act, 1921, and will institute a multiplicity of suits against the petitioner on each of the grounds of supposed violation aforesaid and otherwise proceed in derogation of the right of the petitioner to collect rates and charges for stockyard services rendered under the Schedule of Rates and Charges or tariffs now on file by petitioner with the Secretary of Agriculture, and that upon compliance with said Order the petitioner would be unable to collect from the users of its service the differences between the rates fixed by the said Order of the Secretary and the rates prescribed in the Schedule of Rates and Charges now on file with the Secretary of Agriculture. In the event the relief in said petition prayed was finally granted by this Court, the amounts which petitioner alleges it is legally entitled to receive according to such established and filed rates and charges would be wholly lost to the petitioner, causing it loss from day to day in the State of Missouri, and plaintiff would be irreparably deprived thereof in violation of the Fifth Amendment of the Constitution of the United States.

Now, Therefore, it is by this Court ordered that the defendant Henry A. Wallace, Secretary of Agriculture, and each and all of the officers, attorneys, solicitors, agents and representatives of the United States, and all other persons acting or claiming, or assuming to act, for and under authority of the defendants, or either of them, and all other persons who now seek or attempt, or shall hereafter seek or attempt, to interfere with or abridge the right of the plaintiff or do any act in any wise militating against the right of the plaintiff to collect, demand, receive, and retain rates and charges for stock-yard services at the Kansas City Stock Yards in accordance with the Schedule of Rates and Charges of petitioner now on file with the Secretary of Agriculture be, and they are hereby, restrained and enjoined from instituting, prosecuting, or aiding in instituting or prosecuting, any proceeding or action for penalties, fines, or imprisonment against the petitioner or its agents because of failure to comply with said Order of the Secretary of Agriculture of June 14, 1933, and the enforcement, operation and execution of said Order, and each and every part thereof, by the defendants or any persons acting or claiming, or assuming to act, for or under the authority of defendants, is hereby stayed and suspended for 60 days from the date of this Order, or until further order of this Court.

Provided, however, that the petitioner shall deposit with the Clerk of this Court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect and pending final disposition of this cause, the full amount by which the charges collected under the Schedule of Rates in effect exceeds the amount which would have been collected under the rates prescribed in the Order of the Secretary, together with a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner.

ARBA S. VAN VALKENBURGH,
ALBERT L. REEVES,
MERRILL E. OTIS,
Judges.

[File endorsement omitted.]

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In United States District Court

In Equity. No. 2328

[Title omitted.]

Order continuing in force temporary restraining order

Filed September 19, 1933

Now on this 19th day of September 1933, comes the petitioner as plaintiff herein, and it appearing that the hearing upon the application for a temporary injunction herein has been continued, and that the time allowed by law for the filing of answer herein has been extended by the Court at the request of the defendants;

And the Court being duly advised in the premises, finds that immediate and irreparable injury and damage will result to petitioner unless the temporary restraining order hereinbefore issued is extended and continued in force and effect,

Now, Therefore, it is by This Court Ordered that the temporary restraining order herein issued be and hereby is continued in whole and in accordance with all the terms and conditions thereof in force and effect until decision by this Court upon the application for a temporary injunction as prayed for in the petition filed herein.

ARBA S. VAN VALKENBURGH, *Circuit Judge.*

ALBERT L. REEVES, *District Judge.*

_____, *District Judge.*

The Clerk is directed to enter an identical order in Causes 2329 to 2378, both inclusive, in equity, by this Court, making the identical Order effective in each of said cases.

Dated this 19th day of September 1933.

ARBA S. VAN VALKENBURGH, *Circuit Judge.*

ALBERT L. REEVES, *District Judge.*

_____, *District Judge.*

[File endorsement omitted.]

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In United States District Court

In Equity. No. 2328

[Title omitted.]

And in Equity Cases No. 2329-2378, inclusive, which are companion cases to the above-entitled case.

Answer

Filed November 25, 1933

Come now the defendants in the above-entitled cause and companion cases, and make answer to the petitions hereinbefore filed as follows:

1. Defendants admit the allegations contained in Sections I to III of said petitions.

2. Answering Section V of said petitions: defendants deny each and every allegation contained therein, except as hereinafter otherwise expressly admitted.

(a) Further answering Section V of said petitions and particularly subsection (a) thereof, defendants admit that the evidence shows that the diminution in the net moneys available to owners of petitioner market agencies in 1931, as compared with the net moneys available to such owners in 1929, was due in part to a reduction of approximately 13% in gross revenues, and that petitioner market agencies did not reduce proportionately their operating costs, but defendants deny that such costs could not have

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been reduced. Defendants are without knowledge as to the amount of the selling and buying charges collected by petitioner market agencies during the year 1932 or during the first five months of the year 1933, but say that such matters are not relevant or material to the determination of these cases and that proof thereof is not admissible before this Court.

(b) Further answering Section V of said petitions and particularly subsection (b) thereof, defendants admit that the Secretary found in his Order (Paragraphs 142 and 143) that it is reasonable to expect a good and experienced salesman of cattle and calves to sell 29,000 head of cattle and calves per year; such a salesman of hogs to sell 85,000 head of hogs per year; and such a salesman of sheep to sell 250,000 head of sheep per year. Defendants say that the above estimates of what constitutes a reasonable year's work for salesmen are below the estimates of those salesmen who testified, and that a considerable number of salesmen now employed by petitioner market agencies at Kansas City have attained and exceeded the standard of performance mentioned in the Order, notwithstanding the highly competitive and overmanned condition existing at the Kansas City market. Defendants admit that the Secretary found that the conditions under which salesmanship is performed at the Kansas City market customarily include services incidental to the selling operation, and that these services include the maintenance of contacts with the owners of livestock prior to shipment, appraisal in the country, supervision en route to market either while on pasture, in feed lots, or at railroad feeding stations keeping informed as to changing market conditions, sorting and grading livestock at the market, consulting with owners of livestock at the market, or advising them of the result of sales if away from the market, together with other miscellaneous duties. Defendants further admit the allegation that the evidence at the hearing showed that livestock salesmen, unlike ordinary salesmen, determine the price for the commodity they sell.

165 (c) Further answering Section V of said petitions and particularly subsection (d) thereof, defendants admit that the costs classified as "Business-Getting and Maintaining Expenses" include amounts actually expended during the year 1931 by petitioner market agencies for traveling expenses incident to the appraisal of livestock before a sale, and supervising the feeding of livestock en route to market at feeding stations, advertising, the preparation, printing, and posting of circulars and market reports sent to stockmen; automobile maintenance and transportation; and dues and assessments paid to the Kansas City Live Stock Exchange. Answering the allegation that during the period mentioned in the Order commission rates at the Chicago and St. Louis markets were substantially higher than those charged by petitioner market agencies, defendants say that such matters are not relevant or material to the determination of this case, and therefore require no answer. Answering the allegation that the undisputed evidence dis-

closes the intensity of competitive efforts of packers and others to divert livestock from the Kansas City market, defendants admit that this is true only as to hogs.

3. Answering Section VI of said petitions, defendants deny each and every allegation contained therein, except as hereinafter otherwise expressly admitted.

(a) Further answering Section VI of said petitions and particularly subsection (a) thereof, defendants deny that the Schedule of Rates and Charges first placed under inquiry was established after hearing and investigation by the then Secretary as a just, reasonable, and nondiscriminatory schedule of rates and charges. Defendants say that such Schedule was determined in 1923 by an arbitration proceeding, that such proceeding was conducted upon the suggestion and agreement of the private parties thereto, and that the persons who served as arbiters therein were chosen and agreed upon by said private parties and did not serve in any official capacity which they may have possessed under the Government of the United States but purely by virtue of their selection by agreement of the parties to said proceeding; that the then Secretary of Agriculture merely gave his approval to said plan of arbitration as a mode of compromise and settlement agreeable to the parties thereto. Defendants admit that the Schedule of Rates and Charges agreed upon at said arbitration in 1923 was higher by more than 10% than the

166 rates and charges found to be unjust and unreasonable by the Secretary in this proceeding, and further admit that the rates and charges under inquiry expressed in percentage of net-sales proceeds handled were less at the time of the hearing than 2% thereof and less than the charges for commission or brokerage service for selling other agricultural produce. Defendants further admit that during the period of the World War, and from 1913 to 1919, the rates charged by petitioner market agencies were increased by 10% and that increases of approximately 200% occurred in the cost of living, farm wages, general hourly wages and livestock prices. But defendants say that none of the allegations in said subsection (a) is relevant or material to the determination of this case.

(b) Further answering Section VI of said petitions and particularly subsection (b) thereof, defendants admit that the Secretary stated in Paragraph 129 of his Order that the Packers and Stockyards Act, 1921, does not clothe the Secretary with authority to determine how many agencies would be required to handle properly the business at the Kansas City Stockyards. Defendants say that none of the allegations contained in said subsection (b) is relevant or material to the determination of this case.

(c) Further answering Section VI of said petitions and particularly subsection (d) thereof, defendants admit that the Secretary found (Paragraph 50 of the Order) that the demand for livestock at Kansas City, especially for hogs, is greater than that supplied by the livestock arriving at the public market and that a large number of hogs destined for local slaughter does not pass through the stock-

yards but is purchased directly by packers. Defendants admit that the market price determined at the public stockyards at Kansas City and elsewhere has much weight in determining the prices paid for livestock bought and sold at private stockyards, but say that such matters are not relevant or material to the determination of this case. The allegation that the packers acquire livestock off the public market without contributing proportionately to the cost of maintenance of the public market at Kansas City is likewise wholly irrelevant and immaterial to the validity of the Secretary's Order and to this suit.

(d) Further answering Section VI of said petitions and particularly subsection (e) thereof, defendants admit that the Order
167 contains a finding of fact (Paragraph 19 of the Order) that livestock tends to move from producer to consumer by the most economical route.

4. Answering Section VII of said petitions, defendants deny each and every allegation contained therein, except as hereinafter otherwise expressly admitted.

(a) Further answering Section VII of said petitions and particularly subsection (a) thereof, defendants admit that the costs and expenses recognized by the Government accountant included no expenses incident to interest paid, donations to Community Chest, reserve to meet uninsurable hazards, or allowance for profits, but defendants deny the inference that the Secretary was bound by the opinion of the Government accountant in these respects, and say that the Secretary made a proper allowance for interest, reserve to meet uninsurable hazards, and profits. Answering the allegation on page 17 of the petition to the effect that the separation of species costs into functional costs such as selling, yarding, office work, administration, business getting, etc., was arbitrary and not based on any natural segregations incident to the actual performance of these functions, defendants say that the business of petitioner market agencies naturally divides itself into such functional divisions; that such divisions were followed by the accountant who testified for petitioner market agencies; and that such functional division for the purpose of determining costs is not affected by the fact that the same men commonly perform several different functions. Defendants further say that such separation of costs into functional costs is not arbitrary and that it does not vary from the facts of the business of petitioner market agencies. Defendants admit that the reasonable unit costs found by the Secretary are lower in most instances than those costs actually incurred by petitioner market agencies, and defendants say that the purpose of the inquiry was not to construct a rate order based upon costs actually incurred in maintaining an overly-competitive market, but rather to determine what costs are reasonable. Defendants further say that the Order of the Secretary is not to be tested by whether it allows costs actually incurred but rather by whether the costs allowed in the Order are in themselves reasonable to the shippers of livestock and to the market agencies.

(b) Further answering Section VII of said petitions and particularly subsection (b) thereof, defendants say that the Order in Paragraphs 159 to 163 allows reasonable per head costs to cover compensation for management. Defendants admit that in Paragraph 159 of the Order the cost of management of the two cooperative market agencies on the Kansas City Stockyards is taken into account in determining fair management costs.

(c) Further answering Section VII of said petitions and particularly subsection (c) thereof, defendants admit that the Order does not allow as an element and part of the capital of petitioners any amount for going concern value. Defendants further admit that the Order holds that a rate of return of 6% on fixed capital and 7% on working capital used by petitioner is reasonable, and that the Order allows that amount only in calculating the gross return recognized and covered into the rates and charges established.

(d) Further answering Section VII of said petitions and particularly subsection (e) thereof, defendants admit that the Secretary disallowed as elements of reasonable cost, and did not cover into the rates and charges prescribed, moneys expended for donations to the Community Chests maintained by the Chambers of Commerce in Kansas City, Missouri, and Kansas City, Kansas.

(e) Further answering Section VII of said petitions and particularly subsection (f) thereof, defendants admit that the effect of the Schedule of Rates and Charges is to permit increases in rates to dealers registered under the Packers and Stockyards Act, of 1921, and to permit increases in rates and charges for buying livestock.

5. Answering Section VIII of said petitions, defendants deny each and every allegation contained therein, except as hereinafter otherwise expressly admitted.

(a) Further answering Section VIII of said petitions, and particularly subsection (a) thereof, defendants deny on information and belief the allegation therein contained to the effect that if the prescribed Schedule of Rates and Charges had been in force in 1931 each petitioner would have received an amount, stated in each petition, less than the total calculable costs incurred by each such petitioner in the rendition of stockyards services that year.

Defendants are without knowledge as to the truth of the allegations that the gross yield to each petitioner of the rates and charges collected was less in 1932 by a stated percentage than the revenue received in 1931, and that the gross yield for the first five months of 1933 was less by a stated percentage than that for the first five months of 1932, and also the allegation of the percentage of further reduction which the application of the prescribed rates and charges would cause each petitioner as to each species handled, but defendants say that such matters are irrelevant and immaterial to the determination of this case, and that proof thereof is not admissible before this Court.

Further answering said subsection (a), defendants say that none of the facts alleged therein is relevant or material to the validity

of the Secretary's Order, or to this suit, and that the lawfulness of the rates and charges prescribed in said Order is not to be determined by whether or not each petitioner could earn a sufficient amount thereunder to cover costs as high as those heretofore incurred.

(b) Further answering Section VIII of said petitions and particularly subsection (b) thereof, defendants say that the accountant who testified for the Secretary did not in his cost study set forth the total costs of operation of petitioners for the purpose of showing what were reasonable costs, but he merely testified as to the amount of such costs as he found them. Defendants say that it is irrelevant and immaterial to the validity of the Secretary's Order and to this suit whether or not the gross yield of rates and charges prescribed in the Order, if applied in 1931, would have been less than the cost of operation of the business of any one petitioner during that year. Further answering said subsection (b), and particularly lines six to twenty-three, inclusive, thereof, defendants are without knowledge as to the truth of the allegations therein contained and they therefore deny on information and belief each and every such allegation.

(c) Further answering Section VIII of said petitions and particularly subsection (d) thereof, defendants admit that on page 39 the Order shows that 11 firms handled more than 50% of the total market volume of livestock at the Kansas City Stockyards in 1931, and that 23 firms handled over 75% of the total market volume. Defendants deny the allegation that the Order bases the rates and charges prescribed therein upon the assumption that the firms doing the largest relative volume of business operated their businesses 170 more economically and efficiently than other firms doing a lesser volume of business. Defendants deny upon information and belief all of the other allegations of said subsection (d).

(d) Further answering Section VIII of said petition and particularly subsection (e) thereof, defendants are without knowledge as to the truth of the allegation therein contained, but say that such matter is not relevant or material to the determination of his case, and that proof thereof is not admissible before this Court.

6. Except as herein otherwise expressly admitted, defendants deny the truth of each and all of the allegations contained in said petitions.

Wherefore, having been fully answered, defendants pray that the petitions be dismissed at the cost of the petitioners and for the benefit of such other order or orders as the Court may deem appropriate.

Harold M. Stephens, Assistant, Attorney General; Wendell Berge, Special Assistant to the Attorney General; William L. Vandeventer, United States Attorney; Seth Thomas, Solicitor, Department of Agriculture; J. S. Bohannon, Attorney, Department of Agriculture; G. N. Dagger, Attorney, Department of Agriculture.

[File endorsement omitted.]

In United States District Court

Decree

Filed December 20, 1934

This cause came on for final hearing on the petition herein praying for a decree enjoining and restraining the defendants from enforcing an Order of the Secretary of Agriculture, dated June 14, 1933, in a proceeding pending before the Secretary of Agriculture known as "Secretary of Agriculture v. L. B. Andrews, et al., Docket No. 311," which Order prescribed the maximum rates and charges for sockyard services rendered by petitioner and other market agencies doing business at the Kansas City Stockyards in Kansas City, Missouri. The record made at the hearings before the Secretary was received in evidence by this Court, and some additional evidence was presented by petitioner, oral arguments were made, briefs were filed and the case was fully submitted to this Court by counsel for both parties.

In accordance with the views heretofore expressed in Opinion of this Court, it is hereby

Ordered, adjudged and decreed that the petition hereinbefore filed by the petitioner be, and the same is, hereby dismissed at petitioner's cost, and that the temporary restraining order heretofore granted, be, and the same is, hereby dissolved and set aside.

It is further ordered that petitioner shall, within sixty days from the date hereof, refund to the users of petitioner's services that portion of the rates and charges collected by petitioner since the 24th day of July 1933, which is in excess of the maximum rates and charges prescribed as reasonable in the Order of the Secretary of Agriculture, dated June 14, 1933, which excess amounts have been deposited with the Clerk of this Court each week during the period since the temporary restraining order was granted, and that petitioner shall as soon as possible after the expiration of sixty days from the date of this Order file with this Court under oath a true and accurate account of the amounts so refunded, together with the names and addresses of the persons to whom refunds have been made, and also the names and addresses of persons to whom refunds are due but to whom payment has not been made, and the reasons therefor, together with a sworn statement to the effect that such amount covers all the refunds which petitioner is obligated to make under the terms of this order.

Exceptions are allowed petitioner to the findings, conclusions, and decree of this Court.

Dated this 20th day of December 1934.

ARBA S. VAN VALKENBERGH, *Circuit Judge.*

ALBERT L. REEVES, *District Judge.*

MERRILL E. OTIS, *District Judge.*

[File endorsement omitted.]

[Title omitted.]

Petition for rehearing

To the Honorable the Judges of the District Court of the United States, for the Western Division of the Western District of Missouri:

Comes now the above-named plaintiff and shows to the court that he is aggrieved by the opinion and decree of the court in the above-entitled cases in which the court dismissed on final hearing plaintiff's petition for a permanent injunction against an order dated June 14, 1933, issued by the Secretary of Agriculture, prescribing certain rates and charges to be observed by plaintiff in its business as a livestock market agency at Kansas City, and plaintiff respectfully requests this court to grant a rehearing for the following reasons:

I

That the opinion and decree of the court contain and are based upon novel but erroneous principles of law in that:

(a) The factors which the court, at pages 4 and 5 of the main opinion, prescribes as proper for the use of the Secretary in fixing reasonable maximum rates to be observed by all of the livestock market agencies engaged in separate and distinct businesses as competitors on a given market necessarily involve the elimination for rate-making purposes of all competitive costs; disregard the actual experience of these agencies in the matter of costs and expenses; and base rates entirely upon hypothetical considerations and assumed conditions contrary to the actual facts and conditions, to well-established and long-recognized rules of law in rate-making cases, and to the terms and provisions of the Packers and Stockyards Act, which requires this public livestock market to be maintained as a competitive market.

II

That the court misconstrued and failed to consider the objections made by plaintiff to the findings of the Secretary involved in the present case in that:

(a) The court construed Subdivision (a) of Section VII of plaintiff's petition, and defendants' answer thereto, as presenting only the issue of whether such findings were supported by the evidence; that, on the contrary, the question there presented was whether an unreasonable, arbitrary, and illegal method, as a matter of law, was employed by the Secretary in his purported findings as to reasonable functional unit costs for various functions of the business of these market agencies into which the Secretary had divided the

operations of these businesses, and as to whether an unreasonable, arbitrary, and illegal method was employed by the Secretary in his purported finding of total unit costs through the combining of said separate "reasonable" functional unit costs as found by the Secretary.

III

That the opinion of the court is inadequate, incomplete, and too general in character in that:

(a) It does not meet the requirements of Equity Rule 70½ or of the decisions generally of the United States Supreme Court;

(b) The finding of the court that there was substantial testimony "to support every challenged finding" overlooks and disregards the fact that many of the challenges as contained in plaintiff's petition were admitted expressly or in effect by the answer filed by defendants;

(c) The action of the court in adopting as its findings of facts all the findings of fact of the Secretary makes it uncertain and subject to misunderstanding as to just what the court's findings of fact were;

(d) The court discussed the issues under four major headings, but overlooked and disregarded the fact that the various subdivisions of various sections of the petition contain numerous challenges to the findings and order of the Secretary, and that, except as to the subdivisions contained in Section VII of plaintiff's petition, the
174 court does not discuss any of the issues presented in these subdivisions and makes no findings in respect thereof;

(e) The court does not in its opinion disclose which of the issues presented and not discussed by the court are regarded by the court as immaterial and irrelevant and which are regarded as material and relevant;

(f) The court, at page 1 of the main opinion, through inadvertence states that the number of separate suits pending before this court involving the findings and order of the Secretary is 59, whereas the actual number of such suits was 50; and

(g) The court, at page 3 of the main opinion, inadvertently purports to quote for the purpose of comparison with existing rates the rates prescribed in the order of the Secretary as applying to calves, whereas the rates quoted in the opinion apply to hogs.

Wherefore, plaintiff prays the court to grant a rehearing, humbly submitting to such orders as the court may make if the application be without merit.

JOHN B. GAGE,
CARSON E. COWHERD,
Attorneys for Plaintiff.

Memorandum in Support of Plaintiff's Petition for Rehearing

The importance of the issues here involved cannot be overstated or overemphasized. Many of these issues are novel and are vital

to the important industry in which these plaintiffs are engaged. It becomes extremely necessary, therefore, that the opinion contain a clear, definite, and complete statement of the basis of the decision of the trial court.

Opinion Eliminates Competitive Costs

The court in the main opinion holds, as we read it, that the proper rate-making factors to be employed for an industry in which separate organizations, corporate or otherwise, compete with each other for business are to, first, ascertain "the total volume of business" to be handled by all these competitors on the Kansas City market, second, determine hypothetically how many men are necessary for the "efficient handling of that business," and third, determine the "reasonable costs" of handling that business including the "reasonable compensation" which that hypothetical number of men should receive. This, as we interpret the opinion, requires the hypothetical assumption that the entire business at a particular market is conducted as a single unit. Under this method, costs made necessary by competition are eliminated from consideration for rate-making purposes. Necessary costs cease to be "reasonable" costs because produced by competition. Under this system, actually experienced costs may be ignored and disregarded and the allowance of reasonable costs is to be determined as stated in the opinion on the basis of "judgments" as arrived at by the rate maker. On the basis of such "judgments" is to be determined the number of men required for the entire business, the proper compensation to that number of men, the amount of capital needed, and the fair return on that capital. Monopoly is thus assumed to obtain where in fact none exists. Competition is assumed to be non-existent; when the facts are entirely to the contrary. It is evident under this method of rate making, that in any future hearing involving the rates of these plaintiffs, the actual costs which they sustain in their respective businesses and the effect of ordered rates upon the net returns from their respective businesses will become practically irrelevant and immaterial. Under such a method of rate making, all competitive costs are eliminated, actually experienced costs are cast aside, the effect of rates prescribed upon any particular market agency is disregarded, operation at capacity at all times is assumed, and the true consent of a "market" as a place of competitive buying and competitive selling is ignored.

Packers and Stockyards Act Demands Competition

Under the Packers and Stockyards Act, the term, "market agency," is defined as being any person "engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission

basis; or (2) furnishing stockyard services."¹ And by this same act, the term "stockyard," as used therein, is defined as a place commonly known as a stockyards, "conducted or operated for compensation or profit as a public market."—The phrase "operated as a public market" was not included in the original bills that were introduced in Congress, but was inserted upon consideration of the bills before the Committees of the House and the Senate.

Moreover, an examination of Section 192, Chapter 9, Title 7, U. S. C. A., will disclose that the unlawful practices therein enumerated which the act undertook to prohibit were those practices which tended to create a monopoly and to stifle and eliminate competition in the buying and selling of livestock upon these public markets. The fact that the Secretary has no right under the act to refuse to permit the registration as market agencies of persons desiring to engage in that business but must register them provided they give the required bond, likewise discloses the intention of Congress to make sure that competition on these public markets should be maintained and perpetuated rather than restricted or eliminated. All of these things show quite conclusively that it was never intended that these public markets should become monopolies in which all competition would be thereby eliminated. The legislative authority in positive terms recognizes competition and seeks to preserve it. The administrative authority seeks to destroy it or limit its effect. The stream is thus compelled to rise higher than its source. The court in requiring rates to be fixed on the hypothesis that competition shall be nonexistent as between these agencies and that the entire business at a particular public market shall be considered as if it were operated as a single unit has, therefore, lost sight of these facts.

Omaha Case Approved Use of Typical Costs

The so-called Omaha case may be considered as a milestone along the pathway of rate-making law, in that, under the "monopolistic" conditions there found to exist, the court upheld an order of the Secretary in which he used typical experience as his guide for determining reasonable costs for rate-making purposes. Typical costs, according to the Secretary in that proceeding, represented those figures around which the costs of the different agencies at a given market tended "to cluster." Under this system of cost allowances, greater latitude is given to the rate maker. The "tend to cluster" formula is far more indefinite in its application than any of the other methods commonly employed in determining reasonable costs as, for instance, the use of the weighted average cost. But typical costs are presumably based on the actual experience of the members of the industry whose rates are under consideration.

¹ Subparagraph (c), Sec. 201, Ch. 9, Title 7, U. S. C. A.

² Subparagraph (a), Sec. 202, Ch. 9, Title 7, U. S. C. A.

Hypothetical Costs Approved by Opinion

In the present case, however, the Secretary has gone even further than he did in the Omaha case. Hypothetical costs are those based not upon conditions shown to presently exist but upon assumed conditions which the rate maker expects may or should exist at some future time. As to those costs which the Secretary believed the "conditions of the business" of these agencies tended to increase, he refused to use typical experience as a guide for determining reasonable costs. On the contrary, he based his allowances for costs of that class upon an assumed situation where competition is absent and a monopoly obtains. In other words, he used hypothetical costs. The court not only has approved the methods here employed by the Secretary but has gone even further than the Secretary in the main opinion and has approved the use of hypothetical costs in the determination of reasonable cost allowances for all kinds of expenses including both those which the Secretary believed the conditions of the business tended to increase and those which he believed the conditions of the business tended to keep down. The Secretary did presuppose, in the use of his rate-making processes, the existence of some competition. He refused to recognize all of the costs produced by that competition. He did, however, purport to fix rates that would be reasonable for those firms which received a sufficient volume of business to enable them to handle that business in a reasonably economical and efficient manner. The rate-making factors approved by the court are not so limited in scope or effect. The court in this opinion has conceded to the Secretary a breadth of power for which he did not contend. The decision has, therefore, taken on tremendous significance as a legal precedent. It is novel and far-reaching in its consequences and is not supported by any legal precedent. It is not even supported by the Omaha case. The decision affects all industry exposed to the exercise of rate making or price fixing through public authority.

178. Application of Rate-making Formula Destructive to Other Industries

Apply this theory of rate making to other lines of industry. We find from currently accurate economic studies that the ratio of actual operations to potential capacity in respect of railway transportation facilities is less than 33 $\frac{1}{3}$ %. In respect of the electric power systems, the average unused capacity in excess of the highest instantaneous peak load is 27.9%. The practical average load factor in electric power systems involves a utilization of only 54.7% of capacity. Pipe lines operate at 45% of capacity; pig iron manufacturers at 68%; copper smelters at 40.4%; petroleum refineries at 65.9%; bituminous coal industries at 50%; cotton spinning at 14.5%; wheat flour milling industry at 43.5%; and the wool industry at 41%.³

³ Brookings Institute "America's Capacity to Produce."

These ratios were determined for the year 1930 when business conditions were far more favorable than they were during the subsequent years of the depression. Consider the tremendous effect of applying the method of rate making or price fixing approved by the court to any of these industries. What capital would be needed to supply the light and power requirements of the entire United States assuming there were but one system and that it would be possible for a single system to serve the entire nation? What disposition would be made of the large number of plants and employees rendered unnecessary by such a consolidation? What would become of the unused capacity of these plants and, if rates were fixed on the basis of the used capacity under present conditions, where would the needed money come from to meet the capital requirements of these industries when capacity had to be increased and additions and improvements had to be made for that purpose? Moreover, the use of these rate-making factors would result in the elimination of all competitive costs such as advertising costs and business-getting and maintaining costs. When we come to apply these rate-making processes, we reach some degree of appreciation of the importance of the pronouncements contained in the opinion rendered by this court. The enormous pool of unemployed capital and labor which such a process would create, if, as suggested in the concurring opinion, all industry tried to operate "under the conditions of the order," would stagger the imagination to depict.

179 Opinion Goes Beyond Prudent Investment Theory.

Moreover, one of the factors which the court says must be considered is a fair return upon the capital required for the "efficient handling of the volume of business reasonably to be expected." Under any logical construction of the language used, this means that the capital requirements must be determined on the assumption that the entire business of all of these market agencies is operated as a single unit. The expression "efficient handling" obviously must relate to the time as of which the rate-making processes are actually being employed. In several important public utility rate cases decided by the United States Supreme Court, the minority of that court urged that "the prudent investment theory" was the correct and proper theory and method of determining the rate base. Notwithstanding these minority and dissenting opinions, the prudent investment theory has never, to our knowledge, been approved by the majority of the court in a single rate case. Even under the prudent investment theory, whether or not an investment is prudently made depends upon conditions obtaining at the time the investment was actually made and not upon conditions as viewed in the light of subsequent developments. Even under that method, obsolescence due to improved method or changed condition is not penalized. We submit, however, that the court in the main opinion

in the present case has gone far beyond even the prudent investment theory. Under this opinion, the amount of capital required for the efficient handling of the business is to be based upon idealistic conditions assumed to obtain at the time of the investigation into the reasonableness of the rates or after monopoly has developed at some future date. Under this opinion, obsolescence would no longer be recognized in the fixing of a rate base. The adoption of this method of determining a rate base overrules a long line of respectable authority to the contrary.

Opinion Not in Harmony with Recent Supreme Court Decision

Since the opinion was written in this case, the United States Supreme Court in the case of *Hegeman Farms Corporation v. Baldwin*, 79 L. Ed. 29, has handed down a decision which has considerable bearing on the question of whether proper rate-making factors 180 have been prescribed by the court in the present case. It dealt with the application of price-fixing authority to a business conducted by a group of competitors. A milk dealer in New York contested the validity, under the fourteenth amendment, of certain orders of the New York Milk Control Board fixing a minimum price at which milk dealers could sell milk to consumers. The court in that opinion emphasized that the Board's prices were only minimum prices. That presented a different situation from the one that obtains in the present case. Here the rates prescribed by the Secretary are maximum rates. That the Supreme Court distinguished the case on that basis, clearly appears from the opinion itself. The court said:

"For an understanding of the complainant's position both in its economic and in its legal aspects, the fact is of critical importance that there has been *no attempt* by the Board to fix a maximum price in respect of any of the transactions subject to its regulatory power. What is fixed is a minimum only." [Italics ours.]

* * * * *

"Much is made of a supposed analogy between the plight in which the appellant finds itself and that of public utilities subjected to maximum rates that do not yield a fair return, but the analogy when scrutinized is seen to be unreal. A public utility in such circumstances has no outlet of escape. If it is running its business with reasonable economy, it must break the law or bleed to death. But that is not the alternative offered where the law prescribes a minimum. An outlet is then available to the regulated business, an outlet that presumably will be utilized whenever use becomes expedient. If the price is not raised, the reason must be that efficient operators find that they can get along without a change. Either that must be so else, as was pointed out in the opinion below, the industry will perish. The bill does not suggest that such a catastrophe is imminent."

This language is important not only in distinguishing this milk case from the present case, but it is also important in showing that, where the maximum rates prescribed are so low that the individual competitor is threatened with destruction, courts will grant relief.

In the present case plaintiff alleges that none of the plaintiffs
181 can render efficient service under the ordered rates and that this

is true when applied even to the firms or groups of firms handling the greatest volume of business. This issue is, therefore, before the court in the present case.

It is submitted, moreover, that the decision in this milk case has a direct bearing on the question of whether the court in the present case was correct in approving rate-making methods based on assumed and hypothetical conditions which presuppose the elimination of all competition and the handling of the business on the public market at Kansas City as a single unit. A further reference to the opinion will show that the court clearly recognized that even minimum rates in a competitive field must not be fixed on the assumption of the elimination of all competition, but that some consideration must be given to the realities of the situation. The court said:

"For anything there shown, other dealers at the same prices may now be earning profits. At all events, they are content or they would be led by self-interest to raise the present level. * * * To make the selling level higher might be unfair to the consumer; to make the purchase level lower might bring ruin to producers. The appellant would have us say that minimum prices must be changed whenever a particular dealer can show that the effect of the schedule in its application to himself is to deprive him of a profit. This is not enough to subject administrative rulings to revision by the courts. If the designation of a minimum price is within the scope of the police power, expenses or losses made necessary thereby must be borne as an incident unless the order goes so far beyond the needs of the occasion as to be turned into an act of tyranny. Nothing of the kind is charged. The fourteenth amendment does not protect a business against the hazards of competition. Public Service Commission of Montana v. Great Northern Utilities Co., supra., at page 135. It is from hazards of that order and not from restraints of law capriciously imposed that the appellant seeks relief. The refuge from its ills is not in constitutional immunities. * * * True, of course, it is that the weaker members of the group (the marginal operators or even others above the margin) may find themselves unable to keep pace with the stronger; but it is their comparative inefficiency, not tyrannical compulsion, that makes them laggards in the race."

182 The Court's Definition of Rate-making Procedure Should Be Stated with Greater Clarity

"It is possible, of course, that plaintiff has misconstrued the court's opinion and that the court did not intend that the decision have the

breadth and scope herein ascribed to it. Even if that be true the importance of these cases requires that the court state the basis of its decision so clearly and explicitly that there will be no reasonable grounds for misunderstanding it. In the past rate making has been confined principally to business in which there was a monopoly. It has only been in recent years that rate-making authorities have been concerned with prescribing a minimum or a maximum rate or price for a group of persons engaged in the same business. The trend today is clearly for more rather than less regulation of rates and prices than we have had in the past and this regulation is being applied more and more to groups of individuals engaged competitively in the same business.⁴ This is the first decision by the courts involving market agency rates since the Omaha case in which the failure of the agencies to offer evidence and the finding of monopoly prevented full consideration of the rate-making procedure to be employed under normal conditions. This case will, therefore, serve as a precedent to guide both the Secretary and the market agencies in the future at this and other markets. It is important, therefore, that the parties affected clearly comprehend and understand the guide that has been given them by the court in this decision.

While the court may not agree with us as to the law and the facts in this case, it cannot differ with us as to the importance of this decision either as a legal precedent or as to the great industry affected. The case will constitute another milestone along the pathway of rate-making law. We, therefore, urge further consideration by the court of this aspect of its opinion to the end that the holding of the court may be clarified and clearly understood.

183 Findings of Fact Are Not Sufficiently Comprehensive or Definite

The United States Supreme Court has repeatedly emphasized the necessity of adequate, complete, and specific findings of law and fact by the trial court covering all of the material issues involved in the case. The equity rules reflect these views in demanding that facts be found "specially." This is vitally necessary in a rate case which involves, as does the present case, a vast amount of documentary and oral testimony and in which complicated, novel, and far-reaching questions of law and fact are in issue. Such findings are necessary, not only in the interest of the litigants themselves, but in order that, through the narrowing of the issues by the trial court, the work of the appellate court on appeal may be lessened and made more effective. Thus, in *Virginia Railway Company v. United States*, 272 U. S. 658, 71 Law Ed. 463, Justice Brandeis in his opinion in a case in which an injunction was sought against an order of the Interstate Commerce Commission, stressed the necessity for such findings and

⁴ Sec. 15, Ch. 1, Title 49, U. S. C. A., as amended in 1920, expressly gives I. C. C. power to prescribe joint rates for railroads and to establish just divisions of joint rates. The Packers and Stockyards Act, 1921, does not contain such a provision.

criticized the lower court for its failure in that respect in the following language on page 472 of the Law Edition:

"In view of the importance of the litigation, we interpret the absence of findings as tantamount to a declaration that, upon careful scrutiny of the record, the questions presented for judicial determination appeared to be simple, or, at all events, that the case did not involve the determination of any questions of law which were novel or as to which there was or could be reasonable doubt. Unless an opinion indicating the grounds of the decision is delivered, a defeated party may often be unable to determine whether the case presents a question worthy of consideration by the appellate court. This is particularly true where the case is in equity and the decree is entered upon a hearing involving complicated facts."

And in *Hammond v. Schappi*, 275 U. S. 165, 171, 72 Law Ed. 219, at page 221, the court said:

"These questions have not, so far as appears, been considered by either of the lower courts. The facts essential to their determination have not been found by either court. And the evidence in the record is not of such a character that findings could not be
184 made with confidence. * * * Before any of the questions suggested which are both novel and of far-reaching importance are passed upon by this court, the facts should be definitely found by the lower courts upon adequate evidence"

And in *Railway Commission Company v. Maxey*, 281 U. S. 82, 74 Law Ed. 717, the court had under consideration the action by a statutory court in enjoining the enforcement of a rate order of the Railway Commission of Wisconsin. The trial court "gave no opinion and aside from the general recital in the decree that the court had considered the evidence submitted by the parties and that it appeared therefrom that the valuation fixed by the Commission of the property of the company for rate-making purposes was not supported, the record contained no findings whatever by the district court." Because of this inadequacy and insufficiency of and in the findings, the Supreme Court reversed and remanded the case with instructions to make such findings.

Specific as Well as General Issues Should Be Considered in Opinion

The court in the opinion of Judge Otis makes three findings which are denominated "findings of fact" and three findings which are denominated "conclusions of law." In many respects the findings of fact and the conclusions of law are couched in the same or in substantially the same language and are substantially the same findings. One of the findings, both of law and of fact, is devoted to the question of whether proper procedure was followed by the Secretary in the conduct of the hearings before him. This question was not before the court at the hearing on the merits for the reason that it had been eliminated therefrom by the action of this court in sustaining de-

fendant's motion to strike the portion of plaintiff's petition in which this question was raised. The other two findings of law and fact are merely broad and general statements to the effect that the findings of the Secretary are supported by substantial evidence, are not based upon erroneous rules of law, that the prescribed rates are not confiscatory and that the court adopts by reference as its findings of fact all of the findings of fact as made by said Secretary in said order.

It will be observed upon examining plaintiff's petition that
185 although the challenges made therein to the findings and order fall into the four major headings into which they have been classified by the court in the main opinion, that each of these headings is composed of numerous subdivisions. Aside from the question of procedure which, as above stated, is not in this case at this time, the principal issues raised by plaintiff's petition are those covered by the allegations contained in Sections V, VI, VII and VIII, respectively, thereof. Section V contains four subdivisions, Sections VI and VII six each, and Section VIII contains five subdivisions. Except as to the subdivisions contained in Section VII, which will be considered and discussed elsewhere herein, the court does not comment upon and makes no findings in respect of the allegations contained in any of these subdivisions.

Answer Admits Many Challenges in Petition to Findings of Secretary

At the bottom of page 7 of the main opinion, the court stated that it finds in the record "substantial testimony to support every challenged finding." This language is misleading and confusing, to say the least, in view of the fact that defendant's answer expressly admits certain of the findings challenged by plaintiff in his petition and that other allegations contained in the answer amount in law to an admission of the allegations contained in other parts of plaintiff's petition. The answer consists principally of general denials instead of the specific denials required by equity practice. These general denials were practically abandoned by the defendant at the oral argument and in the presentation of the case by brief. There are many allegations in the answer to the effect that defendants do not know whether the allegations contained in plaintiff's petition are true or not; but whether they are true or not "is immaterial and irrelevant." In advance of the hearing on the merits, the court had overruled defendant's motion to strike out as immaterial or irrelevant some of the allegations contained in plaintiff's petition, and when defendants filed their answer they again raised therein the same questions of relevancy and materiality concerning the petition as had been raised under said motion to strike. A reference to Section VIII of the petition and to the answer thereto will fully illustrate the defective character of the answer and the narrowing effect which the answer had upon the allegations contained in plaintiff's petition.

186 The Court Failed to Determine These Important Issues of Relevancy and Materiality Presented by Pleadings

Which of the challenges made by the plaintiff to the findings and order, whether these challenges be admitted by the answer or otherwise, are deemed by this court to be irrelevant and which are regarded as being material and relevant?

Decline in Gross and Net Income

Is it material that contrary to statements contained in the order of the Secretary the net income to each of the market agencies operating upon the Kansas City market was less in 1931 than it was in 1929 because of the decline in gross income of these agencies and of their inability to reduce proportionately their operating expenses, or that the gross income of these agencies continued to decline both in 1932 and in 1933?

Rapidity of Required Performance Destroys Efficiency

Is it material that the standards of performance for salesmen as prescribed in the order, even if attainable, would, if attained, cause serious losses to the producers of livestock patronizing the public market at Kansas City through reduction in efficiency of marketing agencies, and that this would in and of itself constitute a violation of certain provisions of the Packers and Stockyards Act? ⁵

Necessary Advertising and Other Costs Eliminated

187 Is it material that much of the expense of these agencies, which the Secretary classified as advertising and which he found to be unnecessary, represented costs actually sustained by these agencies for selling and buying services essential in carrying out the normal and necessary functions of their businesses?

Competition of Other Markets and Packers Ignored

Is it material that the competitive efforts of other agencies operating at other public markets, and of the packers in their direct-buying activities are shown by all the evidence to justify these agencies in spending more rather than less for business getting and maintaining?

Value of Service Not Considered

Is it material that the Secretary failed to give consideration to the value of the service rendered by these agencies to their patrons, the producers of livestock?

⁵Sec. 192, Ch. 9, Title 7, U. S. C. A.:

"It shall be unlawful for any packer to:

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of buying, selling, or dealing in, any article in commerce, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce."

Rates Less Than Charges for Handling Any Other Farm Product

Is it relevant that the commissions received by these agencies at the time the rates were placed under investigation by the Secretary were less in proportion to the net sales proceeds of livestock handled by them than they were when these agencies received a far greater volume of livestock, or that the rates received by these agencies for their services were less than the charges made by similar agencies for performing like services in selling any other agricultural product?

Secretary Disallows Actual Costs Which He Caused Agencies to Sustain

Is it material that even though it is admitted by the defendants in their answer that the Secretary does not have the power to determine the number of agencies required to properly handle the volume of livestock coming upon the public market at Kansas City, yet he purports to fix rates so low as to drive agencies and their personnel out of business, or that he failed to give consideration to the undisputed testimony that he had been directly responsible for increasing the number of agencies at Kansas City and had assisted cooperative agencies in obtaining business which would otherwise have gone to these plaintiff agencies, or that he encouraged these competitors to incur the identical kinds of expense which he refused to allow these plaintiffs as reasonable costs in the present case?

Appraised Value of Owner's Services Ignored

Is it material that the Secretary refused to consider the evidence offered by these agencies showing the appraised value of the owner-worker services to their respective businesses?

Improper Classification of Costs

Is it material as to whether there was any basis under the evidence to justify the Secretary in classifying the costs of these agencies into those as to which the conditions of the business tend to keep down and those which the conditions of the business tend to increase?

Cost Tables Mathematically Inaccurate

Is it material that the alleged typical functional unit costs as allowed by the Secretary understate the amount of these costs because the unit cost tables upon which these typical costs were based were in and of themselves incorrect and in practically every instance wholly at variance with the unit cost tables put in evidence by his own accountant?

Costs Erroneously Assembled

Is it material that in assembling total unit costs for all functions the Secretary disregarded the relationship between different functions in that comparatively high costs in individual agencies for one function may necessarily result in a lower cost for another function?

Not One of Fifty Agencies Can Meet Costs on Agencies' Showing

Is it material that if the prescribed rates had been applied to the business of the several plaintiffs in the test year of 1931 that not one of them would have had enough gross revenue from his business to cover his total calculable costs incurred in rendering stockyard services during that year, and that because of the continued decrease in the volume of business in 1932 and 1933, the confiscatory character of the order would have been exaggerated if applied to these later years?

189 Twenty Largest Agencies Have Deficit on Government's Own Showing

Is it material that on the basis of the costs as recognized by the government's chief accountant, that if the ordered rates had been applied to the 1931 business of these agencies, these rates would not have provided a sufficient revenue to these several plaintiffs to enable them to meet such costs, and that on this basis, the twenty largest agencies would have an operating deficit, exclusive of any return on their invested capital and exclusive of any compensation to them as owners for their personal services?

Eleven Largest Agencies Have Deficit on Government's Showing

Is it material that on the basis of the costs as recognized by the government accountants, and exclusive of any compensation to the owners for their personal services, that said ordered rates, if applied to the 11 agencies who handled in 1931 more than 50% of the total volume of livestock handled at the Kansas City market during that year, would have lacked approximately \$20,000.00, of providing the allowance by way of return on capital specified in the order and that as to 23 agencies which handled more than 75% of the total business at this market in 1931 the owners thereof would have received, under such rates, in 1931 no compensation whatever for their personal services and a return on capital invested of only 60% of the amount of the return as found reasonable by the Secretary?

Out-of-Pocket Expense Greater Than Yield of Rates

Is it material that the out-of-pocket expenses paid by an individual petitioner in good faith (exclusive of any return or compen-

sation to owners) amounted to more during the test year than the gross yield of rates ordered into effect by the Secretary?

Materiality of this Evidence Undetermined

These are the issues presented directly by the petition and answer. The opinion does not answer these questions. It should be clarified so that petitioners would have some guide to follow in the
190 future. Proceedings of this character are very costly under the best of circumstances to both petitioner and Secretary.

Further Findings Should Be Made

We are unable to tell from the opinions in this case whether the court failed to discuss these challenges of plaintiff to the findings and order of the Secretary because of an oversight or because the court deemed such challenges irrelevant and immaterial. It is possible that, because of the factors prescribed by the court in the main opinion for rate making and which have been previously discussed herein, the court considers many of these challenges immaterial. Even if that be true, the work of the litigants and of the higher court in the event of an appeal will be simplified and made more effective if all of these challenges are discussed and findings are made thereon. We realize the burden that will devolve upon this court or counsel in making complete findings in the separate and distinct cases now pending before it, but it is submitted that this is necessary, particularly in view of the fact that, in each and every one of these cases, the issue of confiscation is raised. Each petitioner sustained a great burden in placing himself in a position to produce before the court the specific facts relative to the effect of the rates on his particular business. The raising of this issue requires the determination by the court of the effect of the ordered rates upon each and every one of these plaintiffs.

This point, we believe, is admitted by defendants in their brief filed in this case. At page 8 of that brief, the following language appears:

"The only questions of fact bearing upon the question of confiscation are those put in issue by Section VIII of the petitions. They relate solely to the effect which the order would have had upon the business of petitioners if it had been applied to the 1931, 1932, and 1933 business. *These questions are not covered in the Secretary's findings and allegations with respect thereto have been denied in the answer upon information and belief. If this court deems the questions raised by Section VIII of the Petitions to be relevant, then it will have to make an independent determination of the facts in issue under that section on the basis of the evidence is submitted directly to this court at the final hearing.*" [Italics ours.]

191 In the opinion, there is no special or general finding by the court as to the effect of the ordered rates upon the business of

any of the plaintiffs, either for the year 1931 or for the years 1932 and 1933. The court only finds that the rates are not confiscatory as to any plaintiff. No findings are made upon which that conclusion can properly be based. The ordered rates affect each plaintiff differently. These differences will be disclosed if separate findings are made.

Court Improperly Adopted "In Toto" Findings of Secretary

The findings of the Secretary covered 180 separate and distinct paragraphs. Many of these findings were not challenged and were not in issue before the court; many of the other findings were challenged and were in issue before the court. These findings consist not only of findings of fact, but also of findings of law and of mixed findings of fact and law. Such findings are intermingled and intermixed, and the action of the court in adopting as its findings those "findings of fact" made by the Secretary, without pointing out which findings were adopted, leaves it uncertain to everyone concerned as to just what findings made by the Secretary the court actually adopted. The effect of the adoption of the findings of the Secretary by the court is to leave many of the issues exactly where the court found them. It has not by the opinion narrowed or clarified the issues or established any guide by which the parties litigant may know what issues the court actually passed upon and what issues the court did not pass upon, or what issues the court deemed relevant and what issues the court deemed irrelevant.

Court Improperly Construed Issues Presented By Subdivision (a) of Section VII of Petition

On pages 8, 9, and 10 of the main opinion, the court discusses Section VII of the petition. This section challenges the order of the Secretary on the ground that it is based on erroneous conceptions of established rules of law in the particulars set forth in the various subdivisions of that section.

In discussing Subdivision (a) of this section, the court says that the error claimed therein by the plaintiff was that the costs denominated reasonable costs by the Secretary were arrived at arbitrarily and in disregard of the evidence, and that petitioner again raises in this section practically the identical issues presented in preceding sections of the petition. It is manifest that the court has failed to correctly grasp the legal effect and purport of the allegations made in this subdivision. This subdivision challenges the method employed by the Secretary in assembling the data from the evidence before him and upon which data he based his functional unit cost allowance. It also questions the method employed by the Secretary in the reintegration of those functional unit costs into an aggregate unit cost to be covered into the rates which the order establishes.

The order classifies expenses incurred by these agencies into two classes: "First, those which the conditions of the business tend to hold down; and, second, those which the conditions tends to increase." As to the expenses of the first class, the order purports to ascertain the typical cost as distinguished from the hypothetical cost on a unit basis which he develops in his allowances for expenses of the second class. The error complained of relates particularly to Paragraphs 114 to 149, inclusive, of the order and to the tables of alleged individual functional unit costs as set forth in these paragraphs. Here the order purports to find a reasonable per head per species cost for each of eleven separate functions out of the total of all functions into which the Secretary has divided the business of plaintiff. The cost for these eleven functions the Secretary believes "the conditions of the business tend to hold down."

Petition Questions Methods Employed by Secretary in Finding Separate Functional Unit Costs and in Finding Total Functional Unit Costs

The various tables set forth under these paragraphs purport to show the per head cost for the various agencies for each of these eleven functions in accordance with their actual experience as developed by the Secretary's accountants, after, however, deducting therefrom such portion of the actually experienced costs for each of these functions as were deemed applicable to those of the agency personnel whose entire time was not solely devoted to any one of these eleven functions. It was the exception and not the rule 193 when an employee devoted his entire time exclusively to a particular function. Most of the personnel of each agency worked from day to day and from week to week at more than one or at all of these functions. As in a law office, the employee usually does any type of work, in or out of the office, that comes to hand. Accountants both for the agencies and the government in their testimony before the Secretary stated that it was not possible to accurately allocate to these particular functions the entire cost incurred with respect to these functions. This was because the data for this purpose was not at hand. While total costs were ascertainable as to each agency for all functions, total costs were not accurately ascertainable for particular functions. It was found from the evidence, for example, how many head of livestock of a given species were yarded by a particular agency during a particular period of time by all hands connected with the agency. The evidence also showed fairly well how much was paid for the yarding of this species by the limited number of employees whose entire time was devoted to nothing else except the yarding of this particular species. In developing these unit cost tables, the order divides the number of individual species of livestock of each class yarded by the individual agency into the total amount paid to the relatively few paid em-

ployees who were solely employed in that particular service during the period under consideration. This is then set out in these tables as the actual per head unit cost of that agency for yarding that species of livestock. This is so obviously an incorrect method of determining the unit cost per head of that function for any agency that there is no necessity for argument or dispute about it when the method employed is actually understood.

Improper Method of Computation Used

This is not a matter of arbitrarily ignoring evidence. It constitutes the employment of an unsound method of computing these costs from the expenses shown in evidence. There is no question but that this is just what the order does. If the Secretary desired to arrive at a correct statement of individual costs for such a function as yarding by those men whose entire time was devoted to yarding, he should have deducted from the total livestock handled by all of the personnel of the particular agency the total number 194 yarded by those whose entire time was not devoted to that function. With this deduction made, he could have determined the cost per head for yarding a given species of livestock by those employees of any agency whose time was devoted entirely to yarding. If he were unable to do this, he should have employed a different method of ascertaining what the actual functional unit costs were. Upon the basis of individual costs for a function so incorrectly stated, a judgment is then reached by the Secretary as to what constitutes a normal or typical cost for that function. It is stated in the order that this normal or typical unit cost was selected according to judgment as, a reasonable cost for the particular function because it was around the unit figure at which the experience of many of the individual agencies appeared "to cluster."

Cost Tables Inaccurate and Misleading

The tables are not what they purport to be. It was upon these tables that the Secretary relied exclusively to inform his judgment as to what the normal or typical costs were. It is perfectly apparent that typical costs, based on these tables, understate the typicality of the costs so found. It is reasonable to suppose and believe that, had these tables been true and correct, the Secretary would have allowed substantially higher unit costs for these various functions than those which he did allow in the order. It is not possible to determine accurately what the difference in result would have been had the Secretary used proper methods in compiling the data set forth in these tables except when we measure its effect upon the aggregate cost. We do know that functional costs so incorrectly found covered eleven of the important functions of the business of these agencies. It is plaintiff's contention, therefore, that the methods employed by the

Secretary in determining his allowance of unit costs for these eleven functions were arbitrary, unreasonable and void as a matter of law. It is just as unreasonable and improper as it would be in mathematics to undertake to find one-third of nine by dividing by two.

The Secretary then proceeds to reintegrate his allowed functional costs by adding together the amount allowed by him for each of these eleven functions. His action in so doing is also challenged by this subdivision of Section VII of the petition. It is manifest that where

the above complained of errors were committed in the allocation and distribution of costs to functions and in the allowances made by him for such functions, that this method of reintegration necessarily produces an arbitrary and incorrect result. The method employed by the Secretary in the reintegration of the costs eliminates the possibility that an underallowance of cost for one function may be compensated by an overallowance of cost for another function. The method of reintegration, moreover, loses sight of the facts as disclosed by the evidence that a comparatively high cost experienced by a particular agency for a particular function may result in a comparatively low cost for another function by the same agency. The evidence showed, for example, that firms having comparatively high costs classified as business-getting and maintaining costs had relatively low selling costs. (See Chart, Petitioners' Exhibit 11, John W. Roberts, which was placed in evidence before this court.) In other words, the method of reintegration employed leaves entirely out of consideration the relationship between the different functions. It is, therefore, submitted, as stated in plaintiff's petition, that the order is unreasonable and arbitrary as a matter of law. The question as to whether the Secretary had a right to do what he did, or employ the methods he did employ, is a question of law and was properly challenged in the petition as being the application of the erroneous rule of law.

Court Should Set Aside Order Where Improper Methods of Rate Making Are Employed

It was contended by counsel for the government that the courts have no right to criticize methods of rate making employed by rate-making authorities, provided the results obtained are not objectionable. We submit, however, that the courts have never said that they have no right to enjoin an order in which the rate-making methods employed were obviously arbitrary, unfair and unreasonable in and of themselves. As night follows day, such a method would manifestly produce an unfair and unreasonable result. The court clearly has the right to determine from the methods employed by the rate-making authority whether the exercise of that authority "has been manifested in such an unreasonable manner as to cause it in truth to be within the elementary rule that the substance and not the shadow

determines the validity of the exercise of that power." (Interstate Commerce Comm. v. Ill. Central R. R. Co., 215 U. S. 452, 470, 54 L. Ed. 280, 288.)

When we undertook to question at the hearing before the court the methods employed by the Secretary in the present case in his rate-making processes, the government immediately sought refuge under the decision of the court in the Omaha case, on the basis that the court had approved the methods employed in that case. But the methods there employed and the results obtained were very different. The courts have repeatedly considered the methods employed by *rate-making bodies* in carrying out their rate-making functions and have enjoined and set aside orders in which unfair, arbitrary and unreasonable methods were used. Thus, in *Wood v. Vandalia*, 231 U. S. 1, 58 Law Ed. 97, at page 100 of the Law Edition, the court said:

"In these circumstances the ratio of total expense to total earnings affords in itself no sufficient basis for determining the costs of the transportation of the particular traffic covered by the order under review. It alone furnishes no ground for invalidating the finding of the Commission that the existing rates were exorbitant and that the substituted rates would be fair. Before such a ratio could be properly used in setting forth the cost of the specified portion of either justifying the conclusion that the cost, in proportion to the revenue, was substantially the same for that part of the traffic as for the whole, or, if there were a material difference, satisfactorily showing its nature and extent."

"In defending the use of the method adopted below, appellee relies upon the case of *Smythe v. Ames*, 169 U. S. 466, 42 Law Ed. 819

* * * It is sufficient to say that the case cited cannot be regarded as affording basis for contention that a ratio of expense to earnings on the entire business of a railroad or of a division, can be taken to show the cost of some particular item or class of traffic in the absence of evidence with respect to that traffic which would warrant the conclusion that its cost in proportion to the revenue therefrom could properly be expressed."

And in *Chicago, Milwaukee, etc., Rwy. Co. v. Commission*, 274 U. S. 344, 71 Law Ed. 1085, at page 1090 of the Law Edition, the court said:

197 "This case is in principle the same as *Northern P. R. Co. v. Dept. of Public Works*, 268 U. S. 39, 43, 69 Law Ed. 836, 840.

That case involved the validity of an order of the Washington Department of Public Works reducing the intrastate log rates. The carriers assailed them as confiscatory and introduced persuasive evidence that the rates existing before the reduction were not sufficient to pay operating expenses and taxes. The Department, without attacking the proof or attempting to show by reasonably specific and direct evidence what the actual operating costs were, lowered the rates on the basis

of a composite figure representing the weighted average operating cost per thousand gross ton miles on all revenue freight carried on the railroad system. We applied the rule (page 44) that, where rates found by a regulatory body to be compensatory are attacked as being confiscatory, the court may inquire into the method by which its conclusion was reached. Cf. *U. S. v. Abilene and S. R. Co.*, 265 U. S. 274, 288, 68 Law Ed. 1016, 1022; *Chicago Junction Case* (*Balt. & O. R. R. Co. v. U. S.*), 264 U. S. 258, 263, 68 Law Ed. 667, 673; *Interstate Commerce Commission v. Union P. R. Co.*, 222 U. S. 541, 547, 56 Law Ed. 308, 311, and we held that the method pursued by the Department was fundamentally erroneous and constituted a denial of due process of law."

See also, *Great Northern Utilities Co. v. Commission*, 52 Federal (2d) 802, 805; *Beaumont S. L., etc., Rwy. Co. v. U. S.*, 282 U. S. 74, 86, 87, 75 Law Ed. 221, 230, 231; *Missouri Rate Cases*, 230 U. S. 474, 501, 506, 57 Law Ed. 1571, 1592, 1593.

Conclusion

As suggested in the separate concurring opinion of Judge Arba S. Van Valkenburgh, the order has already imposed great hardship upon the individual petitioners and their employees. Most of these men have devoted almost a lifetime to the honorable and useful calling in which they are engaged. The conditions of operation specifically required to meet the effect of the order demand, and, in fact, compel, lowered efficiency. This, in turn, causes loss of business to other markets and agencies engaged in other methods of marketing and means eventual disintegration. Under the best of circumstances the receipts of livestock will be greatly reduced at the Kansas City Market. In other words, to use the language of Justice Cardozo, in *Hegeman Farms Co. v. Baldwin*, *supra*, the petitioners "must break the law or bleed to death" and there is "no outlet of escape." These being maximum, not minimum, rates, the order attacked comes within the description by Justice Cardozo in that case as an "act of tyrannical compulsion" reviewable by courts as a matter of right. Can the Secretary be expected to relent as the separate opinion suggests—or is this court to exercise the power granted it by the Packers and Stockyards Act, 1921, and the Constitution, to review his order?

For all of the above reasons plaintiff respectfully requests a rehearing be granted in these several cases to the end that the opinion may be reconsidered and changed and modified to the extent and in the manner that seems meet and proper to the court.

Respectfully submitted.

JOHN B. GAGE,
CARSON E. COWHERD,
Attorneys for Plaintiff.

Appendix to Petition for Rehearing

In the District Court of the United States for the Western District
of Missouri, Western Division

In Equity

No. 2328 (and Related Cases Nos. 2329 to 2378)

W. O. MORGAN, DOING BUSINESS AS W. O. MORGAN SHEEP COMMISSION
COMPANY, PETITIONER

vs.

UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE,
DEFENDANTS

Before VAN VALKENBURGH, Circuit Judge, and REEVES and OTIS,
District Judges

OTIS, District Judge, delivered the opinion of the Court:

These are fifty-nine cases in equity contemporaneously initiated in this Court, submitted together and now for decision after 199 final hearing. The prayer of the petition in each case is for injunctive relief against the enforcement of a certain order of the Secretary of Agriculture, dated June 14, 1933, fixing maximum rates and charges for stockyard services rendered by the petitioners at the Kansas City Stockyards in Kansas City, Missouri.

The business of each of the petitioners is that of a livestock selling and buying (or marketing) agency. It is a business affected with a public interest whose rates and charges or services rendered by it to its patrons are subject to governmental regulation. Since the business of each of the petitioners directly affects commerce among the several states Congress is authorized by the Constitution to legislate touching such rates and charges. Congress has done that in the so-called Packers and Stockyards Act (42 Stat. L. 163), providing in that Act that such rates and charges shall be such only as are reasonable and delegating to the Secretary of Agriculture the function and power of determining what rates and charges are reasonable. The validity of this legislation has been determined by the Supreme Court (*Tagg Bros. v. United States*, 280 U. S. 420) and is not questioned in these cases.

The Packers and Stockyards Act provides that—

Sec. 310. Whenever after full hearing upon a complaint made as provided in Section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency,

for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum to be charged and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

Pursuant to the provisions of the Act of the Secretary of Agriculture on his own initiative on April 7, 1930, ordered an inquiry into the reasonableness of the rates and charges of the petitioners for stockyard services rendered by them. A hearing followed before an examiner designated for that purpose. Testimony was taken by him which fills 6,721 typewritten pages in addition to which 159 exhibits were offered in evidence. Followed an oral argument before an "Acting Secretary of Agriculture." Thereafter, on May 18, 1932, the Secretary of Agriculture issued an order fixing the maximum rates and charges. A petition for rehearing was granted July 15, 1932. At the rehearing conducted by an examiner testimony was taken which fills 3,091 typewritten pages in addition to which 111 exhibits were offered in evidence. Followed a second oral argument before an "Acting Secretary of Agriculture." Thereafter, on June 14, 1933, the Secretary of Agriculture made and issued findings of fact and the order based thereon fixing rates and charges which is now attacked. A petition for a rehearing as to this order was denied.

The rates and charges of petitioners which were in effect on June 13, 1933, and which the Secretary held were unreasonable were in the form of a fixed charge per head of livestock, bought or sold, the charge varying with the kind of livestock and with the number of animals involved in any transaction. Thus, for selling calves the charge was thirty cents per head for a consignment of from 1 to 20 head, and twenty-five cents per head for all over 20 head. The maximum charges ordered by the Secretary were in the same form. For illustration, the Secretary's order required that the maximum selling charge as to calves should be: thirty-five cents per head in a consignment of one head, twenty cents a head in a consignment of from 1 to 40 head, five cents per head for all over 40 head.

We preface with this brief preliminary statement our consideration of the issues.

In so far as the subject yet has been developed in judicial opinions there are possible only five attacks on such an order as that with which we are here concerned and the petitioners have made all of them save one. They are: (1) that the statutory procedure was not followed; (2) that the findings do not support the order; (3) that the findings are not supported by the evidence; (4) that erroneous rules of law were followed to reach the findings; (5) that the rates and charges fixed in the order are confiscatory and so violative of constitutional rights. *Tagg Bros. v. United States*, supra; *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U. S. 452, 454.

The Procedure

1. Before the Secretary lawfully can make an order of this character he must accord a "full hearing to the interested parties." Sec. 310 of the Act. In the petitions it was alleged that a full hearing was denied in that: (1) each and every of the petitioners was denied a separate hearing; (2) that the Secretary of Agriculture in person did not hear arguments on the evidence but without authority in law delegated that duty to assistant secretaries designated as Acting Secretaries; and (3) that the Secretary signed the order without reading the evidence. On a preliminary hearing we sustained a motion to strike these allegations from the petitions. We think it is unnecessary now to elaborate the obvious observation that the theory of these allegations is supported by nothing in the Act and that a construction of the Act consistent with that theory would destroy it altogether as a measure capable of practical administration.

Findings Support Order

2. The Secretary made 162 findings of fact upon the evidence heard at the original hearing and at the rehearing. No contention is made but that these findings support the order. Unquestionably they do support the order and that fully.

Findings Supported by Evidence

3. The business of a livestock agency is of a personal service character requiring little invested capital. To arrive at what are reasonable rates and charges for the services rendered by such an agency at a given place, as at the Kansas City Stockyards in Kansas City, Missouri, the following factors must be considered: (1) the total volume of business to be transacted; (2) the number of men required for the efficient handling of that business; (3) the reasonable cost of handling the business, including reasonable compensation of the men necessarily employed and other necessary and proper costs; (4) the capital investment required for the effi-

cient handling of the volume of business reasonably to be expected; (5) what is a proper return on the capital so invested; (6) what is a reasonable compensation for management and a reasonable profit. The findings made by the Secretary included all of these factors and every other conceivable factor necessary to be considered. Some of the findings are challenged as contrary to the evidence.

Save possibly where the issue of confiscation is for determination the settled rule is that the findings of the Secretary in a proceeding of this character "must be accepted by the court as conclusive, if the evidence before him was legally sufficient to maintain them." *Tagg Bros. v. United States et al.*, 280 U. S. 420, 444. The court is not concerned with the weight of the evidence, with whether its judgment concurs with that of the Secretary, but only with the question: is any finding essential to the order under review unsupported by any substantial evidence?

With this rule in mind we have gone to the record, with the aid of briefs submitted, and have found therein substantial testimony to support every challenged finding, nor do we find any justification for the contention of petitioners that in arriving at his findings material and relevant evidence was ignored. The important and essential findings, such as, for example, how many hogs an efficient salesman should sell in a given time, what are reasonably compensatory salaries salesmen should receive, what costs are legitimate and what unnecessary, what wastes may be eliminated, indeed almost every finding that was made except those which were merely statistical, clearly depend upon the application to the testimony of the judgment of him charged with the duty of making findings. That duty the law imposes on the Secretary. We cannot overturn his judgment as to such matters when there is evidence to support his findings.

Claimed Errors of Law

It is true that such an order as the one here attacked must
203 be set aside if it rests upon an erroneous rule of law. *Tagg*

Bros. v. United States, 280 U. S. 420, 442. The petitioners assert the applicability of this principle to these cases, but just what erroneous rules of law the petitioners claim were applied by the Secretary we have had some difficulty in gathering from the petitions and briefs notwithstanding the great labor able counsel for petitioners obviously have given to their preparation.

There is no contention that the subject matter sought to be regulated was not within the Secretary's jurisdiction under the statute and no allegation, therefore, of any such fundamental legal error as a misinterpretation of the statute would have been. The contentions, as best we can state them (they purport to be set out in Subdivision VII of each of the petitions), are the following.

A. The costs used by the Secretary were arrived at arbitrarily and in disregard of the facts. Clearly this is not a matter of applying

an erroneous rule of law, but a matter of whether the evidence supports the findings.

B. The Secretary ruled rightly that the reasonable rates to be fixed should include a profit but erroneously that compensation allowed for management and the carrying of uninsurable risks included the element of profit whereas the cost of management and of carrying uninsurable risks are legitimate expenses and the petitioners are entitled to something additional as profits. The answer to the contention is that if it be conceded that it was error to rule that the allowance for management and the cost of carrying uninsurable risks necessarily included all the profit to which an owner is entitled in truth the rates fixed had an additional spread, above all costs, including the two specified, which spread allows and provides for the alleged omission.

C. The Secretary rightly ruled that the petitioners were entitled to a return on capital investment, but erroneously excluded any allowances for going concern values. Such is the contention. The evidence whereon the contention is based is to the effect that the methods and practices used by the petitioners were worth (not that they had cost) \$66,401. The contention is that a return should be allowed on that amount. The view of the Secretary was that while knowledge of these methods and practices was indispensable anyone is
204 free to use them and they are not property. Such knowledge is a part of the necessary mental equipment of those rendering livestock selling and buying service. Compensation for the service includes full return for the use of the knowledge of methods and practices. It is not an element of capital investment. We agree.

D. The Secretary erroneously excluded from consideration of costs various legitimate classes of expenses, such as insurance against normal risks. We find in the record no support for this contention.

E. Various other contentions are made in this connection which we think present no errors of law.

Confiscation

Each of the petitioners claims that the order of the Secretary violates the due process clause of the Fifth Amendment in that it deprives him of his property without due process of law. Whether the presence in these cases of this issue of confiscation entitles the petitioners to the independent judgment of the court as to the law and the facts after a consideration of all of the testimony heard by the Secretary and also additional testimony offered before this Court never has finally been decided by the Supreme Court. *Tagg Bros. v. United States*, 280 U. S. 420, 443. The view that those alleging confiscation are entitled to the independent judgment of the court is supported by such cases as *Ohio Valley Water Works Company v. Ben Avon Borough*, 253 U. S. 287, 289; *Bluefield Water Works Company v. Public Service Commission*, 262 U. S. 679, 689; *Prendergast v. New York Tel. Co.*, 262 U. S. 43, 50; *Lehigh Valley R. Co. v. Board*.

of Public Utility Com., 278 U. S. 24, 36; United Railways & Electric Co. v. West, 289 U. S. 234, 251; Phillips v. Commissioner, 283 U. S. 589, 600. The view that even where the issue of confiscation is present, findings of fact made by the Secretary, if supported by substantial evidence, are conclusive, is supported by a consideration of the text of the Interstate Commerce Act to which the Packers and Stockyard Act refers and by United States v. Louisville and N. R. Co., 235 U. S. 314, 320; Interstate Commerce Commission v. Union Pac. R. Co., 222 U. S. 541, 547, and the dissenting opinion in Ohio Valley Water Works Co. v. Ben Avon Borough, 253 U. S. 287, 297, as well as by the declination of the Supreme Court to pass upon the matter in Tagg Bros v. United States, 280 U. S. 420, 443. Whichever of these views is the correct one, it is certain that there is a strong presumption in favor of the findings made by the Secretary as well as those of any rate making body. Darnell v. Edwards, 244 U. S. 564.

If we proceed on the view that the findings of the Secretary are conclusive, if supported by any evidence, and we have determined that each of them is supported by substantial evidence, then the contentions of petitioners as to confiscation must be resolved against them with the exception of one of those contentions. All of the contentions, excepting one, are based upon the theory that the Secretary's findings as to costs are contrary to the weight of the evidence and that if correct findings were made the costs allowed in fixing rates and charges would be so much greater than those which were allowed as that it would conclusively appear that the rates and charges fixed in the Secretary's order did not adequately provide for costs, and so are confiscatory. If, however, having decided that the findings of the Secretary are sustained by substantial evidence, we are bound by his findings, then we are bound also to conclude that the Secretary's order makes full allowance for all reasonable costs in the rates and charges fixed by the order. The one contention as to confiscation not thus disposed of is that the rate of return allowed by the Secretary's order on invested capital and 7% on working capital, as a matter of law, is confiscatory. We regard that contention as without merit.

If we adopt the view that, having raised the issue of confiscation, the petitioners are entitled to the independent judgment of this court based upon all of the evidence which was before the Secretary, as well as the additional evidence offered at the trial of these cases, only presuming that the findings of the Secretary are correct, the same conclusion touching this issue is reached by us. Such an examination of all of the testimony as reasonably can be made, in view of its immense volume, we have made, reaching the conclusion that the essential findings made by the Secretary not only are sustained by substantial evidence, but are in accordance with the weight of the evidence. Since those findings are right as to costs and since the rates and charges fixed by the Secretary's order adequately provide for costs and for a return on invested capital and for profits as to all petitioners who have shown that their agencies are

efficiently conducted, the issue of confiscation must be resolved against the petitioners.

Other Matters

Contentions of the petitioners which have not been referred to specifically in this opinion have received the consideration of the Court and are resolved against the petitioners.

Findings of Fact

In each of these cases we make findings of fact as follows:

1. The order of the Secretary of Agriculture, dated June 14, 1933, fixing maximum rates and charges for petitioners as livestock selling and buying (marketing) agencies in the Kansas City Stockyards, Kansas City, Missouri, was made after full hearings accorded the petitioners, and each of them, and upon findings of fact made by the Secretary based upon the evidence taken at the hearings.

2. The findings of fact made by the Secretary of Agriculture upon which the order of June 14, 1933, was based are supported by substantial evidence.

3. Upon an independent consideration of the evidence, including the additional evidence taken by the court at the trial of these cases, the Court adopts as its findings of fact the findings of fact made by the Secretary and by reference incorporates them herein.

Conclusions of Law

The Court concludes as matters of law—

1. That the order of the Secretary of Agriculture, dated June 14, 1933, fixing maximum rates and charges for livestock buying and selling (marketing) agencies at the Kansas City Stockyards in Kansas City, Missouri, was made by the Secretary after a full hearing in all respects conforming with the requirements of the Packers and Stockyards Act.

2. That the order is fully supported by the findings of fact made by the Secretary and that those findings were based upon substantial evidence and are supported by the weight of the evidence and are not based upon any erroneous rules of law.

3. That the maximum rates fixed by the Secretary in the order are reasonable and that they do not take the property of petitioners, or any of them, without due process of law in violation of the terms and provisions of the Fifth Amendment to the Constitution of the United States.

Indicated Decree

Counsel for the defendants will prepare and submit to the Court for approval and entry in each of these cases a decree dismissing the plaintiff's bill and assessing the costs against the plaintiff.

In the District Court of the United States for the Western Division
of the Western District of Missouri

In Equity. No. 2328

FRED O. MORGAN, DOING BUSINESS AS FRED O. MORGAN SHEEP
COMMISSION COMPANY, ET AL., PETITIONERS

vs.

UNITED STATES OF AMERICA AND SECRETARY OF AGRICULTURE,
DEFENDANTS

Before VAN VALKENBURGH, Circuit Judge, and REEVES and OTIS,
District Judges

VAN VALKENBURGH, Circuit Judge, concurring:

I agree with the decision to dismiss the bills, but I feel impelled to add some additional views with respect to some features of the findings made by the Secretary of Agriculture in reaching the conclusions leading to his order.

The reason, or at least the main reason, for the difference between petitioners and Secretary, lies in the matter of cost allowances and reasonable return to owners of the business. As stated by counsel for the Secretary, the substantive questions are:

1. Are the Secretary's findings of reasonable costs plus reasonable profits supported by the evidence?
- 208 2. Will the prescribed rate schedule produce sufficient revenue to cover the reasonable costs plus reasonable profits as found by the Secretary?

I think we may regard the entire controversy as resolved by an answer to the first of these questions, because the second is practically conceded, the insistence being that the Secretary's allowance of costs is unreasonable and, therefore, that the resulting profits are so unreasonable as to amount to confiscation.

To my mind, basing the allowance of salaries upon the potential ability of a salesman to sell a given number of carloads in a year is too restrictive. Such ability is not subject to bare mathematical measure. One even casually familiar with stockyard operations knows that an efficient salesman must be a man of sound judgment and experience. His duties in fostering the business of the producer, in causing his product to be reared and brought to sale under favorable market conditions, are of great value and are not subject to mathematical percentage measurement. The stock does not come in such regular periods as to permit a fixed amount of sales, ratably distributed over the market year. When it does come it must be attended to by expert and experienced men to the best advantage of the grower. It is evident, therefore, that an organization must be kept sufficient to handle the business as it is presented. Such employees must be permanent for

this purpose. Capable men cannot be picked up will. They must have a steady job, and at a wage that will reasonably compensate for the experience they bring and the service they perform. In this period, when it is emphasized that labor must receive a fitting reward, it will not do to visit upon the stockyards agencies, which are recognized as necessary to the commerce, too great a burden because of depression in the stock business. In their zeal to aid the stock raiser, government agencies must not forget the men who are essential to the making his market. This applies in a lesser degree perhaps to yardmen and others employed in the business. It is to be emphasized that, if a market agency is to do business at all, it must have and maintain an organization sufficient to handle its business when it comes. An examination of record and briefs indicates that in various ways 200 the agencies have striven to keep costs down. Obviously it was to their interest to do so in years lean at the best. Their judgment as to their necessities should not be lightly set aside or underestimated.

So with respect to getting and maintaining business. Certainly a considerable amount of advertising circularizing, and personal contact is proper and necessary to keep this market prominently before the raisers and shippers of stock in this normal trade territory. The market agencies have to compete with other stock markets, with co-operatives, a percentage of whose profits go back to their members, with packers, and railroad yards, and with direct buyers generally. The fact that there may incidentally result competition between the agencies themselves is no sufficient ground for reducing the costs of such activities to an extremely narrow compass. Also, if such agencies are to continue, the owners, as they are termed, must be allowed to receive a return commensurate with the contribution they make to the success of this market and the risks they assume.

I do not undertake to decide that the costs demanded by petitioners may not in some degree be excessive. Of course, even the most valuable operators cannot expect to make as much out of a small volume of business as out of one much larger; but they must be prepared for any reasonable eventuality, and the return fixed must not be so low as to drive too many of these agencies out of business, to the great injury of this stock market, and, necessarily, to the shippers of stock, who would most conveniently patronize it. What the future volume of business may be is, of course, speculative, and should not be a controlling rate-making factor. The evidence is that the volume is decreasing during the periods under test. It appears that the order of the Secretary would reduce the number of men employed in handling the 1931 market from 188 to about 79. There were only fifty-nine firms originally petitioning. Nine are said to have retired from business, and, from the evidence before us, a number of others will necessarily follow.

It is true that no reasonable rate can be expected to protect all who may elect to engage in this quasi-public business, without regard to prevailing conditions; but the protection of the market against lowering an irreducible minimum is as necessary to the public interests as it is to that of the stock shippers themselves.

210 My reaction to the presentation made is that I should have made a more liberal allowance for costs and owner return—not necessarily as great as that demanded by petitioners, and, of course, with due regard to the number of owners accredited to each firm. Five owners in the same firm cannot each expect to receive the maximum accredited or appraised to one. But it is to be observed that the Secretary has given consideration to all the elements essential to the computation of a general rate of this nature. By the statute he is given almost dictatorial power in the establishment of such rates, provided he gives due consideration to all the elements involved, does not depart from any rule of law, and provided, further, the rates established are not clearly unreasonable and confiscatory.

Just what would be the result of applying those rates to future business upon a reasonable cost basis, or as found by the Secretary, cannot be known, because it has not yet been tried. We cannot bring to the complex conditions involved the same expert judgment as is employed by what the Supreme Court has described as “a tribunal appointed by law and informed by experience.” And we are forbidden to question the soundness of the reasoning, or the wisdom of the conclusions reached, and to substitute our judgment for that of the findings and conclusions announced. I think the attack of petitioners is directed, in its last analysis, to the soundness of the conclusions reached, and I fear that we have no power to disturb them upon the showing made. Renewed application to Secretary or Court may bring relief if reasonable experience, based upon the conditions imposed by the Secretary's order, is found to justify it. In this view I concur in the decision to dismiss the bills.

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In United States District Court

In Equity. No. 2328

[Title omitted.]

Order granting leave to file petition for rehearing

Filed January 2, 1935

On motion of plaintiff for leave to file herein a petition for rehearing, a copy of which petition, together with plaintiff's memorandum in support thereof, is attached hereto, leave is hereby granted plaintiff to file said petition.

In the meantime, and until further order of this Court, let all proceedings under the Decree in said cause be stayed.

ARRA S. VAN VALKENBURGH,
Circuit Judge.

ALBERT L. REEVES,
MERRILL E. OTIS, *District Judges.*

To the CLERK OF THIS COURT:

Let the above Order be entered in identical form in each of the related cases docketed as In Equity Nos. 2329 to 2378, inclusive.

ARRA S. VAN VALKENBURGH,
Circuit Judge.

ALBERT L. REEVES,
MERRILL E. OTIS, *District Judges.*

[File endorsement omitted.]

In United States District Court

In Equity. No. 2328 (and Related Cases Numbered 2329 to 2378, Inclusive)

[Title omitted.]

Stipulation as to consolidation

Filed June 15, 1935

At appearing to counsel for the respective petitioners and defendants in the above entitled causes that many of the issues presented in the respective pleadings in each of said causes are common and present in each of said causes the same questions of law and fact, and that it will serve the convenience of Court and counsel if said causes be consolidated for the purpose of trial, presentation, and further proceedings therein,

213 It is Hereby Stipulated and Agreed by and between the parties hereto that the Court may enter a suitable order of consolidation of the said causes for the purpose of trial, presentation, and further proceedings. It is understood and agreed by the parties hereto that such order of consolidation may be entered solely to serve the convenience of Court and counsel and that such order shall not prejudice in any manner the right of petitioners and each of them to several and individual presentation, consideration, and determination, by any Court having occasion to pass upon the issues herein, of such of the issues in each of said causes as are several in character and individual to each separate action.

JOHN B. GAGE,
Counsel for Petitioners.

HAROLD W. STEPHENS,
Counsel for Respondents.

June 15, 1935.

[File endorsement omitted.]

In United States District Court

In Equity. No. 2328 (and Related Cases Numbered 2329 to 2378,
Inclusive)

[Title omitted.]

Order consolidating causes

Filed June 15, 1935

Pursuant to stipulation of counsel for all parties, dated June 15, 1935, which has been filed herein, it is hereby ordered that each of the causes covered by said stipulation, the same being in equity numbered 2328 to 2378 inclusive, shall be and the same hereby are consolidated for the purpose of trial presentation and all further proceedings herein.

ARRA S. VAN VALKENBURGH,
United States Circuit Judge.

ALBERT L. REEVES,
United States District Judge.

MERRILL E. OTIS,
United States District Judge.

[File endorsement omitted.]

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In United States District Court

In Equity. No. 2328 and Related Cases Nos. 2329-2378, Inc.

[Title omitted.]

*Order denying petitions for rehearing and entering joint and final
decree in cases as consolidated*

Filed June 20, 1935

The petition for rehearing, filed by plaintiffs herein by leave of Court, having been presented to the Court pursuant to the Order to Show Cause directed to the defendants herein by oral arguments and briefs of counsel for both parties, and the Court being fully advised in the premises,

It is Hereby Ordered and Adjudged by the Court, in accordance with the views expressed in the opinion of the Court, that said rehearing be not granted and the petitions for rehearing should be, and the same hereby are, denied. Exceptions are allowed to the Order of the Court denying said petitions for rehearing.

And it further appearing to the Court that by order of the Court pursuant to stipulation of counsel for all parties, the above cause and related cases bearing Docket Nos. 2329-2378, inclusive, have been consolidated for the purpose of trial presentation and all further proceedings therein and that separate decrees entered in each of said cases as of the 20th day of December, 1934, should be set aside and withdrawn

and a joint decree, in accordance with the views heretofore expressed in the opinion of the Court, be entered as of this date in the cases as consolidated in lieu of said separate decrees to constitute the finding and judgment of this Court.

It is, Therefore, Ordered, Adjudged, and Decreed that the separate decrees entered in each of said cases as of the 20th day of December, 1934, be, and the same are hereby, set aside and withdrawn and that the following order, judgment, and decree be substituted therefor in accordance with the views expressed in the opinion of the Court:

That the petitions heretofore filed by the petitioners be, and the same are, hereby dismissed at the respective cost of each of said petitioners and that the temporary restraining orders heretofore granted be, and the same are hereby, dissolved and set aside.

215 It is further ordered that petitioners, and each of them, shall within sixty (60) days from the date hereof, refund, or cause to be refunded by the Clerk of this Court to the users of petitioners' services that portion of the rates and charges collected by petitioners since the 24th day of July, 1933, which is in excess of the maximum rates and charges prescribed as reasonable in the Order of the Secretary of Agriculture dated June 14, 1933, which excess amounts have been deposited with the Clerk of this Court each week during the period since the temporary restraining order was granted, and that petitioners shall as soon as possible after the expiration of sixty days from the date of this Order file with this Court under oath a true and accurate account of the amounts so refunded, together with the names and addresses of the persons to whom refunds have been made, and also the names and addresses of persons to whom refunds are due but to whom payment has not been made, and the reasons therefor, together with a sworn statement to the effect that such account covers all the refunds which petitioners are obligated to make under the terms of this Order.

Exceptions are allowed to the findings, conclusions, and decree of this Court.

And the Court being advised of the intention of the plaintiffs herein to prosecute an appeal to the Supreme Court of the United States, does, in order to avoid irreparable damage to plaintiffs, suspend and stay execution upon the judgment herein entered for a period not in excess of the time allowed by law for presenting a petition for appeal herein, upon the condition, however, that the requirement for impounding set forth in the temporary injunctions granted herein shall be complied with by plaintiffs and each of them pending the application for and the allowance of such appeal.

Dated this 20th day of June 1935.

ARBA S. VAN VALKENBURGH,

Circuit Judge.

ALBERT L. REEVES, *District Judge.*

MERRILL E. OTIS, *District Judge.*

[File endorsement omitted.]

Mandate of Supreme Court

Filed June 4, 1936

UNITED STATES OF AMERICA, ss:

{SEAL}

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Western District of Missouri, Greeting:

Whereas lately in the District Court of the United States for the Western District of Missouri, before you, or some of you, in causes between F. O. Morgan, doing business as F. O. Morgan Sheep Commission Company et al., Petitioners, and The United States of America and The Secretary of Agriculture, Defendants, in equity, No. 2328 (and relates cases Nos. 2329-2378, Inc.), wherein the Final decree of the said District Court dismissing the petitions and dissolving the temporary restraining orders was duly entered in said causes on the 20th day of June, A. D. 1935, which decree is fully set out in the record of said causes in the office of the clerk of said District Court and is incorporated herein by reference thereto;

As by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States by virtue of an appeal sued out by F. O. Morgan, Doing Business as F. O. Morgan Sheep Commission Company et al., agreeably to the Act of Congress, in such case made and provided fully and at large appears.

And Whereas in the present term of October, A. D., 1935, the following order was entered of record:

"On Consideration of the motion of counsel for the New Amsterdam Casualty Company that the said Casualty Company be substituted as a party appellant in this cause in the place and stead of Harry J. Kennaley, doing business as Harry Kennaley Commission Company, the plaintiff in case No. 2356 on the docket of the District Court of the United States for the Western District of Missouri;

It Is Ordered by this Court that the said motion be, and the same is hereby granted, and that the New Amsterdam Casualty Company be, and it is hereby, substituted as a party appellant herein in the place and stead of Harry J. Kennaley.

June 1, 1936."

And Whereas in the present term of October, in the year of our Lord one thousand nine hundred and thirty-five, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On Consideration whereof: It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, reversed.

And It Is Further Ordered that this cause be, and the same is hereby, remanded to the said District Court for further proceedings in conformity with the opinion of this Court.

MAY 25, 1936.

You, therefore, are hereby commanded that such further proceedings be had in such cause, in conformity with the opinion and decree of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the second day of June, in the year of our Lord one thousand nine hundred and thirty-six.

[SEAL]

[Signed] CHARLES ELMORE CROPLEY,

Clerk of the Supreme Court of the United States.

[File endorsement omitted.]

In United States District Court

In Equity. Nos. 2328-2378

[Title omitted.]

Supplemental answer

Filed July 11, 1936

Come now the defendants in the above entitled cause and answer the allegations of Paragraph IV of the petitions, as follows:

218 1. Answering subparagraph (a) of Paragraph IV, defendants admit that the Secretary overruled and denied the request of each petitioner for a separate, individual, and independent hearing apart from any other of the respondents named in the notice of inquiry, but defendants deny that any of the petitioners was prejudiced thereby.

2. Answering subparagraph (b) of Paragraph IV, defendants admit that at the conclusion of the hearings held before the Examiner counsel for petitioners requested that the Examiner prepare a tentative report upon the evidence to be presented to the petitioners and the Secretary subject to oral argument as to any exceptions thereto which the petitioners might care to present and that such request was denied and no tentative report was exhibited to petitioner prior to oral argument. Answering the allegation that no oral argument upon the issues presented by the order of inquiry and the evidence taken by the Examiner was at any time had before the Secretary, defendants say that on March 24, 1933, oral argument was had before the Acting Secretary of Agriculture and that petitioners' counsel was present at such time and made a lengthy oral argument, and that petitioners' counsel made no objection at such time to the adequacy of the opportunity given for oral argument.

3. Answering subparagraph (c) of Paragraph IV, with respect to the allegation that at the time when oral arguments were presented,

the Secretary of Agriculture was in Washington, D. C., at his office in the Department of Agriculture, and was neither sick, absent, nor from any other cause disabled in the performance of official duties, while defendants say that such allegation is irrelevant and immaterial as a matter of law, they nevertheless admit the facts therein alleged. Defendants deny each and every other allegation contained in said subparagraph (c). Defendants further say that the oral argument which was had on March 24, 1933, before Acting Secretary Tugwell was reduced to writing and transmitted to the Secretary of Agriculture, and that counsel for petitioners also filed with the Secretary a printed brief.

4. Answering subparagraph (d) of Paragraph IV, defendants admit that the Secretary of Agriculture did not personally hear oral arguments, otherwise defendants deny each and every allegation contained therein.

5. Except as herein expressly admitted, defendants deny each and every allegation contained in Paragraph IV.

Wherefore, having fully answered herein the allegations of said Paragraph IV, and having fully answered all of the other paragraphs (sections) of the petitions in the answer filed November 23, 1933, defendants pray that the petitions be dismissed.

Maurice M. Milligan, United States Attorney; Wendell Berge, Special Assistant to the Attorney General; John Dickinson, Assistant Attorney General; G. N. Daigger, Attorney, Department of Agriculture.

On this 11th day of July, 1936, leave is by the court granted to defendants to file the within supplemental answer.

(Signed) MERRILL E. OTIS, Judge.

[File endorsement omitted.]

In United States District Court

In Equity. Nos. 2328-2378

[Title omitted.]

Amended application of petitioners for leave to amend petitions

Filed September 17, 1936

Come now petitioners in each of the above cases and respectfully request the Court for leave to amend by interlineation the petitions filed herein by striking out all of Section IV thereof and substituting therefor, by interlineation, the following:

"IV"

Petitioner alleges that petitioner was denied and failed to receive, although duly demanded, a full hearing upon the matters and things

set forth in said Order of Inquiry, or any of them, and that it has not been accorded the full hearing to which it is entitled under the provisions of the Packers and Stock Yards Act of 1921 and
220 under the Fifth Amendment to the Constitution of the United States, and that by reason thereof the order of the Secretary of Agriculture made herein on June 14, 1933, is null and void as not being in compliance with said statute and would if enforced deprive petitioner of its liberty and property without due process of law; that petitioner has been deprived of the full hearing to which it is entitled as aforesaid, by reason of the following matters and things, as to each of which petitioner alleges that it constitutes in and of itself and together with any other or others thereof, a denial of the full hearing to which petitioner is entitled by virtue of said statute and the Fifth Amendment to the Constitution of the United States, and petitioner expressly demands that the defendants make separate and explicit answer to each of the matters and things hereinafter set forth, irrespective of whether or not it be alleged in a separate lettered paragraph:

(a) Henry A. Wallace, the Secretary of Agriculture, who made and signed the order of June 14, 1933, herein was not personally present when any of the testimony herein was taken and did not hear any of said testimony given, nor, on information and belief, was such testimony, or any of it, read to or by him, either the testimony offered by the petitioner or by the defendants.

(b) All of the testimony taken in the administrative proceeding herein was heard by John C. Brooke, an examiner of the Department of Agriculture. The petitioner offered the testimony of sixty-six witnesses. The respondents offered the testimony of forty-four witnesses. As to the testimony of each one of these witnesses, the petitioner alleges on information and belief that the Secretary neither heard it nor read it, nor had it read to him, nor read or examined any fair or adequate abstract, analysis or synopsis thereof.

(c) As to the testimony of each of the aforesaid witnesses, the petitioner alleges on information and belief that the Secretary did not examine or consider the same.

(d) As to the testimony of each of the aforesaid witnesses, the petitioner alleges on information and belief that the Secretary did not judicially appraise the same.

(e) In the course of the administrative hearings before Examiner Brooks, the petitioner introduced one hundred thirty
221 exhibits and the respondents introduced three hundred eighty-six. Petitioner alleges on information and belief as to each of these exhibits that the Secretary did not read it, did not have it read to him, nor did he read any fair or adequate abstract, analysis, or synopsis thereof.

(f) As to each of said exhibits petitioner alleges on information and belief that the Secretary did not examine or consider the same.

(g) As to each of said exhibits petitioner alleges on information and belief that the Secretary did not judicially appraise the same.

(h) At the conclusion of said administrative hearings before said examiner, petitioner demanded that the Secretary personally hear oral argument on its behalf. The Secretary failed and refused to hear oral argument.

(i) On or about the 25th day of May, 1933, petitioner submitted a brief on the law and facts involved in said administrative hearings with the demand that the Secretary read and consider the same. Petitioner alleges on information and belief that the Secretary failed and refused to read said brief.

(j) Petitioner further alleges on information and belief that the Secretary did not read any fair or adequate abstract, analysis or synopsis of said brief.

(k) Petitioner alleges on information and belief that the Secretary did not examine or consider said brief.

(l) Petitioner alleges on information and belief that the Secretary did not judicially appraise the arguments contained in said brief.

(m) At the conclusion of the administrative hearings before said examiner, petitioner demanded that a tentative report upon the evidence be prepared to which it might make exceptions prior to oral argument before the Secretary thereon. Petitioner's demand was refused and no tentative report was ever prepared.

(n) On information and belief, instead of personally considering the evidence and argument presented by petitioners and judicially appraising the same, the said Secretary, without warrant or
222 authority of law, delegated to one Rexford G. Tugwell, who purported to act in the premises as and in the place and stead of the Secretary of Agriculture, the powers and authority vested by law solely in the said Secretary, which powers and authority involved the exercise of legislative and judicial discretion and the determination of the issues with respect to the justice, reasonableness and lawfulness of the rates and charges of this petitioner. Said purported appointment of said Tugwell as Acting Secretary of Agriculture to act in the place and stead of the said Secretary was unauthorized and illegal by reason of the fact that from the time he began to act until June 14, 1933, when the order herein was made, the said Secretary of Agriculture was in Washington, D. C., at his office in the Department of Agriculture, and at no time during said period was either sick, absent, or disabled from any other cause in the performance of the official duties of Secretary of Agriculture."

Wherefore your petitioners severally pray the order of this Court.

JOHN B. GAGE,

FREDERICK H. WOOD,

Counsel for Petitioners.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Order granting leave to amend petitions

Filed November 6, 1936

The amended applications of petitioners in equity cases Nos. 2328-2378 to amend by interlineation the petitions therein having been duly considered by the Court and the Court being fully advised in the premises, are by the Court sustained. It is so Ordered.

(Signed) Arba S. Van Valkenburgh, United States Circuit Judge; (Signed) Albert L. Reeves, United States District Judge; (Signed) Merrill E. Otis, United States District Judge.

[File endorsement omitted.]

223

In United States District Court

In Equity. Nos. 2328-2378

[Title omitted.]

Answer to petitions as amended

Filed December 4, 1936

Come now the defendants in each of the above cases and answer the amended petitions as follows:

1. Defendants reiterate and adopt all of the allegations contained in the answer originally filed herein.

2. Answering Section IV of the petitions as amended, defendants say that the matters set forth in the first paragraph of said Section as amended are conclusions of law which do not require an answer; nevertheless, defendants deny each and every allegation of said first paragraph.

Defendants answer the allegations of the separate lettered paragraphs of Section IV as follows:

(a) Answering paragraph (a), defendants admit that Henry A. Wallace, Secretary of Agriculture, who made and signed the order of June 14, 1933, herein, was not personally present when any of the testimony herein was taken and that he did not physically hear any of said testimony when it was given. Except as above expressly admitted, defendants deny each and every allegation of said paragraph (a).

(b) Answering paragraph (b), defendants admit that all of the testimony taken in the administrative proceeding herein was taken at hearings before John C. Brooke, an examiner of the Department

of Agriculture. Defendants admit that the petitioners offered the testimony of sixty-six witnesses and that the respondents offered the testimony of forty-four witnesses. Defendants admit that the Secretary of Agriculture did not physically hear the testimony presented. Except as above expressly admitted, defendants deny each and every allegation of said paragraph (b).

(c) Defendants deny each and every allegation of paragraph (c).

(d) Defendants say that the matter alleged in paragraph (d) is a legal conclusion which does not require an answer;

224 nevertheless, defendants deny each and every allegation of paragraph (d).

(e) Answering paragraph (e), defendants admit that in the course of the administrative hearings before Examiner Brooke, the petitioners introduced one hundred thirty exhibits and that the respondents introduced three hundred eighty-six exhibits. Except as above expressly admitted, defendants deny each and every allegation of said paragraph (e).

(f) Defendants deny each and every allegation of paragraph (f).

(g) Defendants say that the matter alleged in paragraph (g) is a legal conclusion which does not require an answer; nevertheless defendants deny each and every allegation of paragraph (g).

(h) Answering paragraph (h), defendants admit that at the conclusion of the administrative hearing before the examiner, petitioners demanded that the Secretary personally hear oral argument on their behalf, and that the Secretary did not personally hear oral argument in the sense of being physically present when such argument was made. Defendants say that oral argument was made by counsel for petitioners on March 24, 1933, before Assistant Secretary of Agriculture Rexford G. Tugwell, and that the oral argument was stenographically reported and transmitted to the Secretary of Agriculture along with the record, briefs, and other pertinent matters in the case, and that the Secretary considered said report of the oral argument, along with the record and briefs and other pertinent matters, in arriving at the rates prescribed in the order of June 14, 1933. Defendants further say that at the hearing for oral argument before Assistant Secretary Tugwell on March 24, 1933, counsel for petitioners made no objection whatsoever on account of the absence of the Secretary from the hearing, and that counsel for petitioners fully argued his case before Assistant Secretary Tugwell without indicating any objection to having the argument before said Assistant Secretary Tugwell.

(i) Answering paragraph (i), defendants admit that on or
225 about the 25th day of May 1933 petitioners submitted a brief on the law and facts involved in the administrative proceeding. Except as above expressly admitted, defendants deny each and every allegation of said paragraph (i).

(j) Defendants deny each and every allegation of paragraph (j).

(k) Defendants deny each and every allegation of paragraph (k).

(l) Defendants say that the matter alleged in paragraph (l) is a legal conclusion which does not require an answer; nevertheless, defendants deny each and every allegation of paragraph (l).

(m) Defendants admit the allegations of paragraph (m), but say that the facts contained in such allegations are irrelevant and immaterial as a matter of law to any cause of action which petitioners may have.

(n) Defendants deny each and every allegation in paragraph (n) except that defendants admit that from March 24, 1933, the date upon which counsel for petitioners made oral argument before Assistant Secretary of Agriculture Rexford G. Tugwell, to June 14, 1933, the date upon which the order herein was signed by Secretary of Agriculture Henry A. Wallace, the Secretary of Agriculture was in Washington, D. C., at his office in the Department of Agriculture, and at no time during said period was either sick, absent, or disabled from any other cause in the performance of the official duties of the Secretary of Agriculture. Defendants further say that the oral argument was stenographically reported and transmitted to the Secretary of Agriculture, along with the records, briefs, and other pertinent matters in the case. Defendants further say that at the hearing for oral argument before Assistant Secretary Tugwell counsel for petitioners made no objection whatsoever on account of the absence of the Secretary of Agriculture from the hearing and that counsel for petitioners fully argued the case before Assistant Secretary Tugwell without indicating any objection to having the argument before him.

Wherefore, having fully answered, defendants pray that the
226 petitions as amended be dismissed at the cost of the petitioners and for the benefit of such other order or orders as the Court may deem appropriate.

Maurice M. Milligan, United States Attorney, by Richard K. Phelps, Asst.; John Dickinson, Assistant Attorney General; Wendell Berge, Special Assistant to the Attorney General; James C. Wilson, Special Attorney; G. N. Dagger, Attorney, Department of Agriculture.

DECEMBER —, 1936.

Received service of copy hereof this 4th day of December 1936.

JOHN B. GAGE,
By C. E. COWHERD,
Attys. for Petitioners.

[File endorsement omitted.]

In United States District Court for the Western District of Missouri
Western Division

In Equity. No. 2328 and Related Cases Nos. 2329-78

FRED O. MORGAN, DOING BUSINESS AS FRED O. MORGAN SHEEP COM-
MISSION COMPANY ET AL., PETITIONERS

vs.

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE,
DEFENDANTS

Decree

Filed July 9, 1937

The above entitled cause having come on regularly for trial on the 4th day of May 1937, before Judges Arba S. Van Valkenburgh, Albert L. Reeves, and Merrill E. Otis, and testimony having been offered on behalf of the parties herein and affidavits and depositions having been duly filed and proof and testimony on behalf of the petitioners and the defendants having been duly submitted and heard and oral arguments having been made to the Court and Briefs filed by counsel for both sides and the cause having been fully submitted to this Court and the Court upon consideration of the above

mentioned testimony and depositions and affidavits, arguments
227 and briefs on the 2nd day of July 1937, having by the Honorable Merrill E. Otis, District Judge, duly made and filed herein a memorandum opinion, Special Findings of Facts and Conclusions of Law and having indicated judgment for the defendants.

It is on motion of counsel for the defendants.

Ordered, Adjudged, and Decreed that the petitions, as amended, herein filed by the petitioners shall be and the same are hereby dismissed at the petitioners cost.

Circuit Judge.

ALBERT L. REEVES,

District Judge.

MERRILL E. OTIS,

District Judge.

[File endorsement omitted.]

In United States District Court.

In Equity. Nos. 2328-2378.

[Title omitted.]

Order continuing temporary restraining order and staying operation of order of Secretary of Agriculture, dated June 14, 1933, pending appeal to Supreme Court of United States from decree of July 9, 1937, dismissing petitions herein

Filed August 16, 1937

Upon all the proceedings heretofore had herein, it is hereby found that the above-named consolidated causes came on to be heard before the undersigned, Merrill E. Otis, Judge of the District Court of the United States for the Western District of Missouri, Western Division; Arba S. Van Valkenburgh, Judge of the Circuit Court of the United States for the Eighth Circuit; and Albert L. Reeves, Judge of the District Court of the United States for the Western District of Missouri, Western Division, sitting as a District Court for said Division of said District, pursuant to the Packers and Stockyards Act of 1921 (42 Stat. 159) and the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 319); and that said Court on July 9, 1937, made and entered its joint and final decree therein dismissing the petitions filed by the petitioners herein; and that petitioners have duly filed with said Court their petition for appeal, assignments of error, prayer for reversal, and jurisdictional statement as required by the Rules of the Supreme Court of the United States; and that said appeal
230 prayed for has been duly allowed by this Court, and security for costs of said appeal has been duly filed as provided by said order of said Court, and citation to the respondents has duly issued; and that this appeal involves difficult and novel questions of law of fundamental importance, among others, questions as to the nature and scope of the quasi-judicial duty of the Secretary of Agriculture in making orders of the character involved herein; the necessity of his personally weighing and appraising the evidence as a whole in the administrative proceedings; the nature and scope of the duties cast upon respondents in such proceedings with respect to the summarizing of evidence; and the weight to be accorded to the opinion evidence in this case with respect to the potential performance of livestock salesmen; and it further appearing that unless, pending said appeal, said order signed by said Secretary on June 14, 1933, shall be wholly suspended and stayed and the temporary restraining order heretofore granted herein be continued in full force and effect, irreparable damage will result to the petitioners, and each of them, pending such appeal, should said decree be reversed on appeal; and, therefore, this Court being fully advised in the premises,

It Is Now Hereby Ordered, upon the consent of the solicitors for the respondents, that pending such appeal and the further order of this Court to be made pursuant to the final decision of the Supreme Court of the United States, said order of said Secretary of Agriculture signed June 14, 1933, shall be, and the same hereby is, suspended and stayed, and said temporary restraining order shall be, and the same hereby is, continued in full force and effect; and as a further condition of the granting of this stay that during the pendency of said appeal the conditions of said temporary restraining order shall continue in full force and effect, requiring that the petitioners, and each of them, continue to deposit for impounding with the Clerk of the District Court for the Western District of Missouri, Western Division, monthly, on or before the 10th day of each calendar month, a sum equal to the difference between the amount that petitioners, and each of them, hereafter and up to and including the time of the final determination of said cases, receive from the rates and charges for stockyard services supplied at the Kansas City Stock Yards as
 231 market agencies, and the amount that such petitioners, and each of them, during said time would receive if they should render said services at the maximum rates and charges as provided in said order signed by the Secretary of Agriculture on June 14, 1933, said moneys, together with any and all other moneys heretofore deposited and impounded with said Clerk by each of said petitioners pursuant to provisions and conditions under which the temporary restraining order was issued by this Court, to be held by said Clerk pending the further order of this Court to be made pursuant to the final decision of the Supreme Court of the United States.

Entered this 16th day of August 1937.

ARBA S. VAN VALKENBURGH.

ALBERT L. REEVES.

MERRILL E. OTIS.

Consented to: Wendell Berge, Hugh B. Cox, Solicitors for Respondents.

JULY 21, 1937.

[File endorsement omitted.]

232

In United States District Court

Mandate of Supreme Court

Filed June 6, 1938

United States of America, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA,
 [SEAL]

To the Honorable the Judges of the District Court of the United States for the Western District of Missouri, greeting:

Whereas, lately in the District Court of the United States for the Western District of Missouri, before you, or some of you, in a cause

between Fred O. Morgan, Doing Business as Fred O. Morgan Sheep Commission Company, et al., Petitioners, and The United States of America and the Secretary of Agriculture, Defendants, Equity No. 2328, and related cases Nos. 2329-78, wherein the decree of the said District Court, entered in said cause on the 9th day of July, A. D. 1937, is in the following words, viz:

"The above entitled cause having come on regularly for trial on the 4th day of May 1937 before Judges Arba S. Van Valkenburgh, Albert L. Reeves, and Merrill E. Otis, and testimony having been offered on behalf of the parties herein and affidavits and depositions having been duly filed and proof and testimony on behalf of the petitioners and the defendants having been duly submitted and heard and oral arguments having been made to the Court and Briefs filed by counsel for both sides and the cause having been fully submitted to this Court and the Court upon consideration of the above mentioned testimony and depositions and affidavits, arguments, and briefs on the 2nd day of July 1937 having by the Honorable Merrill E. Otis, District Judge, duly made and filed herein a memorandum opinion, Special Findings of Facts and Conclusions of Law and having indicated judgment for the defendants.

233 It is on motion of counsel for the defendants.

Ordered, Adjudged, and Decreed that the petitioners, as amended, herein filed by the petitioners shall be and the same are hereby dismissed at the petitioners' cost.

_____, *Circuit Judge.*

ALBERT L. REEVES, *District Judge.*

MERRILL E. OTIS, *District Judge.*

as by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress, in such case made and provided, fully and at large, appears.

And Whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty-seven, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the Decree of the said District Court, in this cause be, and the same is hereby, reversed.

And it is further ordered that this cause be, and the same is hereby, remanded to the said District Court for further proceedings in conformity with the opinion of this Court.

April 25, 1938

234 You, therefore, are hereby commanded that such further proceedings be had in such cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the third day of June, in the year of our Lord one thousand nine hundred and thirty-eight.

CHARLES ELMORE CROPLEY,

Clerk of the Supreme Court of the United States.

235

In the United States District Court

[Title omitted.]

In Equity. No. 2328 and Related Cases Nos. 2329-78

Defendants' motion for order staying distribution of impounded moneys

Filed June 7, 1938

Now come the United States and the Secretary of Agriculture, respondents herein, by their attorney, Maurice M. Milligan, and respectfully show the Court:

1. These suits, consolidated for the purpose of trial, were brought by petitioners to restrain the enforcement of an order of the Secretary of Agriculture issued on June 14, 1933, fixing the maximum rates to be charged by market agencies for buying and selling livestock at the Kansas City Stock Yards. By an opinion dated April 25, 1938, and by a further opinion dated May 31, 1938, denying respondents' petition for rehearing; the Supreme Court of the United States held that the order of the Secretary had been issued without, according to petitioners, the hearing required by law; and the said Court reversed the decree of this Court dismissing the petitions, and remanded the case to this Court "for further proceedings in conformity with our opinion." The mandate of the Supreme Court of the United States was received by this Court on June —, 1938.

236 2. Upon petitioners' applications, this Court, in the exercise of the discretion conferred upon it by Section 316 of the Packers and Stockyards Act (7 U. S. C. § 217) and by the Act of October 22, 1913 (28 U. S. C. § 46), granted on July 22, 1933, and from time to time continued an interlocutory stay of the order issued by the Secretary of Agriculture on June 14, 1933, conditioned, however, upon the payment into court by petitioners of the difference between the rates established by tariffs published prior to June 14, 1933, and the lower rates fixed by the said order of the Secretary. Between July 22, 1933, and November 1, 1937, when a new rate schedule became effective by consent, petitioners paid into court pursuant to the aforesaid condition sums aggregating more than \$700,000; and these moneys are now in the custody of the Clerk of this Court and subject to order of the Court made in accordance with law.

3. The said moneys were impounded by the Court in order to protect the substantial rights of all parties interested in or affected by

the order of the Secretary of June 14, 1933; and the principles of equity and the provisions of the Packers and Stockyards Act alike require that the moneys shall be disposed of only in accordance with the substantial rights of such parties as duly and finally determined. No court has yet held that the excess charges collected by petitioners under the interlocutory order of the Court were reasonable or lawful, nor has any court yet held that the rates fixed by the Secretary in his order of June 14, 1933, were unreasonable. The impounded moneys stand as security for the enforcement of the respective claims of the parties herein and of the shippers with respect to these questions. Until these questions have been duly and finally determined, no distribution of the moneys can be made which will not prejudice either the rights of petitioners to collect reasonable charges for their services or the right of the shippers not to be compelled to pay charges in excess of what is reasonable, and which will not prejudice the rights of all parties to secure an authoritative and enforceable determination as to what charges are reasonable.

237 4. On June 1, 1938, the Secretary of Agriculture issued an order reopening the proceeding in which the aforesaid order of June 14, 1933, was entered. In the said order of June 1, 1938, the Secretary of Agriculture directed that the "Proceedings, Findings of Fact, Conclusions, and Order" as issued by the Secretary of Agriculture on June 14, 1933, be served upon the market agencies operating on the Kansas City stockyards as the tentative findings of fact, conclusions, and order of the Secretary of Agriculture in the reopened proceeding, and that the said market agencies be given thirty days from the date of service of the said order of June 1, 1938, within which (1) to file exceptions to said tentative order, conclusions, and findings of fact, in accordance with the rules of practice adopted by the Secretary of Agriculture governing the procedure in such cases, and (2) to make any appropriate motions or objections with respect to further proceedings in the case. A copy of the said order of June 1, 1938, is attached hereto as an exhibit. In the proceeding reopened by the said order of June 1, 1938, the Secretary, as provided by the rules of procedure adopted for such cases on September 14, 1936, will accord to petitioners every right to which the Supreme Court of the United States has held that they are entitled. After full hearing the Secretary will determine by an order as of June 14, 1933, what rates may reasonably be charged by petitioners to their clients for the services rendered them. That order will finally determine—or if the order be the subject of litigation, the final judgment of the court in that litigation will finally determine—all the questions decisive of the rights of the parties herein and of the shippers in the moneys impounded in this Court pursuant to the Court's interlocutory order of July 22, 1933. The withholding of the distribution of the said moneys pending the entry of this order by the Secretary will make it possible for the question of the ultimate ownership of these moneys to be determined in an orderly manner, will prevent a multiplicity

238 of suits, will assure that the moneys will be disposed of in accordance with equity and law, and will protect the substantial rights of all parties whose rights and interests are involved.

Wherefore, the United States and the Secretary of Agriculture, by their attorney, Maurice M. Milligan, respectfully move the Court to enter an order staying all further proceedings herein and directing the Clerk of this Court to retain in his custody the moneys impounded in this Court pursuant to the interlocutory order made by the Court on July 22, 1933, and continued in effect from time to time by further orders of this Court, until such time as the Secretary, proceeding with due expedition, shall have entered a final order in the proceeding reopened by him by order of June 1, 1938, and such order shall have become effective or its merits have been finally adjudicated by a court of competent jurisdiction or until further order of this Court.

MAURICE M. MILLIGAN,
United States Attorney.
By THOMAS A. COSTLOW,
Assistant.

239 [Duly sworn to by Martin G. White; jurat omitted in
printing.]

240 Exhibit A to motion

No. —

United States of America
Department of Agriculture

June 6, 1938

Pursuant to Title 28, Section 661, U. S. Code (Section 882, Revised Statutes of the United States), I hereby certify:

1. That there are now on file in this Department the following-described original documents:

Order reopening proceeding—BAI Docket No. 311.

Secretary of Agriculture v. L. B. Andrews, doing business as L. B. Andrews Livestock Commission Co., et al., Market Agencies, doing business at the Kansas City Stockyard, Kansas City, Mo.

2. That a true and correct copy of the original of each of said documents is attached hereto.

By direction of Henry A. Wallace, Secretary of Agriculture, and in witness whereof, the said copies of said documents are hereby authenticated and the seal of the Department of Agriculture affixed hereto, and I have signed my name hereto on the day and year first above written.

[SEAL]

J. D. LA CROSS,
Assistant to the Secretary of Agriculture.

United States of America
Before the Secretary of Agriculture
Bureau of Animal Industry
Docket No. 311

SECRETARY OF AGRICULTURE

v.

L. B. ANDREWS, DOING BUSINESS AS L. B. ANDREWS LIVESTOCK COMMISSION COMPANY, ET AL., MARKET AGENCIES, DOING BUSINESS AT THE KANSAS CITY STOCKYARD, KANSAS CITY, MISSOURI, RESPONDENTS

Order reopening proceeding

Whereas the Secretary of Agriculture, on June 14, 1933, issued his findings of fact, conclusion, and order in the above entitled proceeding, declaring that the rates and charges which were then being demanded and collected by the market agencies operating on the Kansas City Stockyards were unreasonable, and further finding and prescribing just and reasonable rates and charges set forth in detail in said order; and

Whereas suits were filed in the United States District Court for the Western District of Missouri by various market agencies attacking the validity of said order, and seeking an injunction against its enforcement; and

Whereas the court granted a temporary restraining order in which it was provided that the market agencies should impound with the court the moneys collected in excess of the rates and charges prescribed by the Secretary of Agriculture in said order; and

Whereas on October 29, 1934, the District Court rendered an opinion and entered findings of fact and conclusions of law upholding the order of the Secretary of Agriculture, rejecting all the contentions of the market agencies, and adopting as its own the findings of fact made by the Secretary of Agriculture; and

242 Whereas, on the appeal of the market agencies, the Supreme Court held, on April 25, 1938, that the Secretary's order was invalid because the market agencies were not fairly advised of what the Government proposed to do, and were not given opportunity to be heard upon such proposals;

It is therefore ordered that said proceeding be, and the same is hereby, reopened; and

It is also ordered that the "Proceedings, Findings of Fact, Conclusion, and Order," as issued by the Secretary of Agriculture on June 14, 1933, be served upon said market agencies as the tentative findings of fact, conclusion, and order of the Secretary of Agriculture in this proceeding; and

It is further ordered that said market agencies be, and they are hereby, given thirty (30) days from the date of service hereof within

which to file exceptions to said tentative findings of fact, conclusion, and order, in accordance with the rules of practice adopted by the Secretary of Agriculture, governing the procedure in such cases, and within which to make any appropriate motions or objections with respect to further proceedings in this case; and

It is further ordered that said market agencies, if they file exceptions to said tentative findings of fact, conclusion, and order and desire to make an oral argument on the exceptions, may, if they wish to do so, request that such oral argument be held before the Under Secretary or Assistant Secretary of Agriculture;

It is further ordered that this order be served by mailing a true copy thereof, by registered mail, to the attorneys of record representing the market agencies who filed said suits.

In witness whereof the Secretary of Agriculture has signed this order and caused the official seal of the Department of Agriculture to be affixed hereto in the City of Washington, this the 2nd day of June 1938.

[SEAL]

(Signed) H. A. WALLACE,
Secretary of Agriculture.

[Title omitted.]

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In United States District Court

In Equity. No. 2328 and Related Cases Nos. 2329-78.

Reply of plaintiffs to defendants' motion for order staying distribution of impounded funds

Filed June 11, 1938

Come now the plaintiffs herein by their attorneys of record and respectfully move the court to deny and overrule defendants' motion for order staying distribution of impounded moneys held by the Clerk of this court in the Registry of the court for the following reasons:

1. Because said motion is impertinent and irrelevant to any issue presented to the court in the above entitled causes which issues have been fully and finally determined by final decree entered in accordance with a mandate of the Supreme Court.

2. Because the defendants and neither of them have any right, title, or interest in or to said funds so deposited in the Registry of this court with the Clerk of this court, but all of said funds, subject to the right of the Clerk to deduct the lawful charges for the custody thereof as provided by statute, are the sole property of these plaintiffs.

3. Because the allegations of said motion contained in paragraph 3 thereof are predicated upon the alleged right of this court to act legislatively and to determine retroactively what rates and charges collected by petitioners are reasonable or

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lawful, whereas this said court is wholly without such power in fact or in law.

Plaintiffs state that as shown by the evidence at the trial of this cause the Secretary of Agriculture by a valid order effective January 1, 1926, in a proceeding under said Act known as Docket No. 11 of the Department of Agriculture, Bureau of Animal Industry, upon complaint and after full hearing, prescribed as just and reasonable, certain maximum rates and charges for these plaintiffs, a copy of said order as approved by said Secretary being in evidence in this case as plaintiffs' Exhibit "24"; that the rates and charges actually collected during the period of said impounding were lower than the maximum rates so fixed by such order of January 1, 1926, and were those set forth in Tariffs duly filed by plaintiffs with the Secretary of Agriculture under said Act on the 11th day of May 1932, in further compliance with said prior order. The copy of said order, Exhibit "24," and the admission of the defendants in their answer filed in this case that the rates set forth in the said Tariffs filed by plaintiffs on the 11th day of May 1932, were lower by more than ten percent than the maximum rates prescribed by said prior order effective January 1, 1926, are by reference made a part of this motion.

Plaintiffs state that the Secretary of Agriculture has not in any proceeding after full hearing by valid order determined such rates and charges to be unjust, unreasonable, discriminatory, or unlawful, and that as actually collected by plaintiffs at all of the said times in defendants' motion mentioned the said rates were the legal rates which plaintiffs under said Act were required to and did collect.

245 4. Because the alleged determination of the Secretary to enter a new order retroactively effective "as of June 14, 1933" in respect of which "the rules of procedure adopted for such cases on September 14, 1936" will be followed, cannot under the said Packers and Stockyards Act, 1921, determine what shall be the just and reasonable rates and charges to be charged by petitioners at or upon any date prior to five days after the actual entry and issuance thereof by the Secretary under the provisions of the said Packers and Stockyards Act, 1921, particularly Section 310 thereof, and, therefore, cannot in any manner affect or impair the right, title, and interest of the plaintiffs in and to the moneys deposited by plaintiffs with the Clerk of this court and referred to in said motion, or constitute any reason for staying or delaying the restitution thereof to the plaintiffs herein, and that any attempt by the Secretary to give a retroactive or ex post facto effect to the said proposed order in respect of said moneys so impounded, or the right, title, and interest of plaintiffs therein would be in violation of the Constitution of the United States.

5. Because the alleged reopening of the proceedings out of which the purported order of June 14, 1933, held invalid by the court arose in so-called Docket No. 311, cannot involve a lawful and legislative

determination of rates by reason of the stipulation and order of modification entered by the Secretary on the 14th day of October, 1937, effective as of the first day of November 1937, establishing rates thereafter to be effective and recognizing substantial changes in conditions affecting the operations of petitioners since the year 1931, the year to which the latest evidence taken related. A copy of said stipulation and order of modification is hereto attached and made a part hereof.

6. Because under the provisions of the Packers and Stock-
246 yards Act, 1921, and upon the evidence taken in connection with the proceeding referred to in defendants' motion, the Secretary proposes, without authority of law under the guise of exercising his legislative power *nunc pro tunc* as of June 14, 1933, to attempt to act judicially and to award reparations and because such action would involve the recognition in the Secretary of authority to suspend by untimely proceedings schedules and tariffs lawfully filed by petitioners for a period of more than five years although said Act authorized only timely suspension for stated reasons for a period of sixty days after such schedules were filed.

7. Because this court cannot properly indulge the presumption that the Secretary will at some future date render after full hearing an *ex post facto* order holding the rates and charges collected by plaintiffs to be unlawful, and that such order would be sustained if subjected to proper court review.

8. Because withholding from petitioners of said impounded funds pursuant to said motion would improperly, unjustly, and without authority of law deny to petitioners their equitable as well as legal right to the immediate possession of such funds in that it appears from the record of this proceeding that a majority of this court considering such record in an opinion rendered on the 20th day of June 1935 stated that the Secretary had departed from the methods employed in previous like cases in connection with the making of the purported order; that the drastic reduction in advertising and other costs made by the purported order gave "scant consideration to the reasonable necessities of the situation," and that the effect of the methods employed might "as suggested by the petitioners tend to weaken and to ultimately destroy the market by diverting business to more favored markets and agencies," and might tend "further to the undue restriction of agencies enabled to operate profitably with a result injurious not only to the Kansas City Live Stock

Market "but equally to the shippers of stock conveniently
247 patronizing it," and because it further appears that from the record in this case that a large number of petitioners have already been compelled to discontinue business by reason of impoundings required during the period of the pendency of this case and prior to the adjudication of said order as invalid, and because others of petitioners continuing in business have suffered financially by reason of such situation to an extent which may, unless said funds

are immediately restored to them, impair their ability to render in the future efficient service to those who may be called upon to use their necessary services in connection with the sale and purchase of live stock as required by said Packers and Stockyards Act.

Wherefore, these plaintiffs respectfully move the court to deny and overrule the motion of the defendants for an order staying distribution of said funds.

FREDERICK H. WOOD,
JOHN B. GAGE,
Attorneys for Plaintiffs.

THOMAS T. COOKE,
CARSON E. COWHERD,
Of Counsel.

248 [Duly sworn to by Frederick H. Olander; jurat omitted in
printing.]

249 United States of America

Before the Secretary of Agriculture

Bureau of Animal Industry

Docket No. 311

SECRETARY OF AGRICULTURE

v.

L. B. ANDREWS, DOING BUSINESS AS L. B. ANDREWS LIVESTOCK COM-
MISSION COMPANY, ET AL., PETITIONERS

STIPULATION AND ORDER OF MODIFICATION OF ORDER

STIPULATION

Whereas, pursuant to the provisions of the Packers and Stockyards Act, 1921, as amended, the Secretary of Agriculture issued an order in the above-entitled case on the 14th day of June 1933, prescribing reasonable rates and charges to be observed by respondents for their services as market agencies; and,

Whereas, the validity of said order is in question in certain actions brought by petitioners in the District Court of the United States for the Western Division of the Western District of Missouri, said actions being now pending upon appeal from the decree of said court in the Supreme Court of the United States; and,

Whereas, petitioners, members of the Kansas City Livestock Exchange through their duly authorized agents have filed a petition with the Secretary of Agriculture alleging that substantial changes have occurred since 1931, the year on which the order was based, in

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practically all of the costs affecting the business of petitioners more particularly as follows:

- (a) Increased and increasing costs of living.
- (b) Increased cost of stationery, printing, taxes and postage.
- (c) New expenses and taxes brought about by the Social Security Act.
- (d) Decline in receipts of certain species of livestock.
- (e) Increased volume of small lots of livestock caused by increased truck receipts, and in many other ways. Petitioners further allege the value of the services rendered by them to the rate-payer has increased since 1931 because of the substantial increases in the values of livestock. In support of these allegations petitioners submit exhibits setting out statistical information relating to costs and expenses; and,

250 Whereas representatives of the Department have made detailed analyses of the data submitted by petitioners herein showing the results of the operations of a number of representative market agencies for the year ended June 30, 1937, and comparisons thereof with the operations for the year 1931, the year on which the order was based, and have submitted detailed reports of their findings; and

Whereas the facts set forth in the petition which were examined show that changes in conditions affecting the costs of expenses of operations of petitioners do not warrant a modification of the order to the extent requested, but do warrant some modification of the rates prescribed in said order, due chiefly to (a) a substantial decrease in the gross income of the petitioner agencies which has necessitated a substantial reduction in the salaries paid to their employees and a reduction in the number of employees; (b) increasing cost of living and a trend toward increased wages for labor of a class which is to some extent employed by petitioners in the conduct of their business; (c) a marked increase in the arrival of livestock by truck which necessarily increased the handling of small consignments, occasioning more work and greater expense; (d) increased expenses due to taxes as the result of Federal and State legislation since 1931; and (e) decreased in receipts of livestock.

Now, therefore, the petitioners agree that if the modification of the order hereinbefore stated is granted it will be for the period from November 1, 1937, to and including April 30, 1938, and for such time thereafter as the Secretary may need for the consideration of the reports herein required, and that pending the final determination of the actions hereinbefore referred to in which the validity of said order of June 14, 1933, is in question and thereafter in the event the validity of such order be sustained in said actions, the Secretary may, without further hearing, make such further modifications of the order as he deems proper in the circumstances with the understanding, however, that no reduction will be made below the rates and charges fixed by said order of June 14, 1933, without

petitioners' consent, except after a hearing pursuant to the Packers and Stockyards Act, 1921; and,

Petitioners further agree to submit to the Secretary at the close of 1937 and quarterly thereafter an itemized statement of the number of head of cattle and calves sold in each class and group and the charges collected thereon according to the provisions of the tariff as herein modified, and that the Secretary may use the information contained in such reports as a basis for considering further modification without a hearing; and,

Petitioners and the Secretary of Agriculture further agree that if a modification of the order as hereinbefore stated be granted by the Secretary, it shall be without prejudice to either petitioners or the defendants in said actions; that a suitable motion or stipulation agreeable in form and content to the Secretary and his attorneys shall be presented to the court in connection with the further impounding of funds by petitioners under orders entered in said
251 actions; and that this stipulation shall not be considered in evidence or a part of the record, or be used by any of the parties to such actions for the purpose of affecting in any way the final determination of the issues presented by such litigation.

Respectfully submitted this eleventh day of October, 1937.

(Signed). By JOHN B. GAGE.

*For and on behalf of petitioners, members
of the Kansas City Livestock Exchange.*

ORDER OF MODIFICATION

The petition, information and the foregoing stipulation have been considered. Subject to the conditions set forth in the foregoing stipulation the order of June 14, 1933, is hereby modified effective on the first day of November, 1937, providing for rates and charges for the selling and buying of cattle and calves as follows, to continue in effect until further order of the Secretary:

Definitions

A consignment, for the purpose of assessing selling charges, is all the livestock of one species delivered in the name of one person to one market agency to be offered for sale during the trading hours of one day.

A consignment, for the purpose of assessing buying charges, is all the livestock of one species bought at any time to ship or deliver to one person on one market day.

A draft, is all those animals in one consignment weighed as a single sales or purchase classification.

A person, is an individual, a partnership, a corporation, and/or an association of any such acting as a unit.

Calves, are animals of the bovine species, weighed in drafts, the average weight of the animals in which is 70 pounds and under 700 pounds.

Medium weight cattle, are animals of the bovine species, weighed in drafts, the average weight of animals in which is 700 pounds and under 1,000 pounds.

Heavy weight cattle, are animals of the bovine species, weighed in drafts, the average weight of the animals in which is 1,000 pounds and over.

252 Section A—Cattle and Calves—Selling Charges

Calves:

Consignments of a single head.....	\$.40 per head
Consignments of more than one head:	
First 1 to 15 head.....	.30 per head
Next 16 to 30 head.....	.20 " "
Next 31 to 60 head.....	.15 " "
61 head and over.....	.10 " "

Light weight cattle:

Consignments of a single head.....	\$.70 per head
Consignments of more than one head:	
First 1 to 15 head.....	.60 " "
Next 16 to 30 head.....	.45 " "
Next 31 to 60 head.....	.35 " "
61 head and over.....	.25 " "

Medium weight cattle:

Consignments of a single head.....	\$.80 per head
Consignments of more than one head:	
First 1 to 15 head.....	.70 " "
Next 16 to 30 head.....	.55 " "
Next 31 to 60 head.....	.45 " "
61 head and over.....	.35 " "

Heavy weight cattle:

Consignments of a single head.....	\$.85 per head
Consignments of more than one head:	
First 1 to 15 head.....	.75 " "
Next 16 to 30 head.....	.65 " "
Next 31 to 60 head.....	.55 " "
61 head and over.....	.45 " "

Buying Charges

The rates for buying cattle and calves shall not be in excess of the rates prescribed herein.

In witness whereof the Secretary of Agriculture has hereunto set his hand and caused the official seal of the Department of Agriculture to be affixed hereto in the City of Washington, District of Columbia, this 14th day of October, 1937.

(signed) H. A. WALLACE,
Secretary of Agriculture.

[Title omitted.]

In Equity. No. 2356

Answer to defendants' motion for order staying distribution of impounded funds

Filed June 11, 1938

Comes now New Amsterdam Casualty Company and does state to the court that on motion made in the Supreme Court of the United

States the New Amsterdam Casualty Company was substituted for and in the place and stead of Harry J. Kennaley in the above entitled cause, and does further state that on the 2nd day of January, 1936, the said Harry J. Kennaley was expelled from the Kansas City Live Stock Exchange and from and after said date ceased to be and was not any further engaged in the business of buying and selling live stock, or being a marketing agency under the Packers & Stockyards Act; and that by assignment duly made, the said Harry J. Kennaley did assign and transfer unto the New Amsterdam Casualty Company, of Baltimore, Maryland, all of his right, title, and interest in and to all sums of money deposited and impounded with the Clerk of this court, in accordance with orders made in this cause.

254 It does further state that the said Harry J. Kennaley died on the 9th day of January 1938.

It does further state that by virtue of the facts above, the said order of the Secretary of Agriculture dated the first day of June 1938, could not in anywise be operative or effective as far as this cause is concerned, and that said order has not and could not be served upon the said Harry J. Kennaley, nor was it served upon the New Amsterdam Casualty Company, nor would it be of any force or effect to serve the same upon the New Amsterdam Casualty Company as it is not conducting the business formerly conducted by Harry J. Kennaley, nor is it now or ever has been a marketing agency as defined in the Packers & Stockyards Act.

It does further state that the Secretary of Agriculture by his pretended action cannot now cure the failure to give the said Harry J. Kennaley during his lifetime a full hearing, and that that failure to do so when proper to be done cannot be cured by the present attempted action on the part of the Secretary of Agriculture.

It does further state that the attempted action of the Secretary of Agriculture is not in accordance with the provisions of the Packers & Stockyards Act, and that said New Amsterdam Casualty Company, the now owner of the impounded funds, is not and cannot be made a party to any hearing or proceeding under said Packers & Stockyards Act as it is not and has not been a marketing agency.

255 It does further state that for the reasons above given the action of the Secretary of Agriculture in purporting to promulgate order referred to in said motion and by so doing to take away from the New Amsterdam Casualty Company its right, title, and interest in and to said impounded funds is taking the property of the New Amsterdam Casualty Company without due process of law contrary to the provisions of the 5th Amendment to the Constitution of the United States.

It does further state that the amount so impounded was collected by the said Harry J. Kennaley, and that he had title to said sums and the title to said sums remained in him though the possession and custody thereof was given to the Registry of the Court under the Court's orders, and that since the mandate of the Supreme Court that any and all assertions of other parties interested or entitled to

said funds have been wiped out so that at the time of the collection, deposit, and impounding of said funds there was and cannot be any adverse claim of interest and title to said funds as the New Amsterdam Casualty Company is the assignee of Harry J. Kennaley the right, title, and interest in and to said fund is wholly and completely vested in the New Amsterdam Casualty Company and the purported action on the part of the Secretary of Agriculture to deprive the New Amsterdam Casualty Company of the immediate possession of said funds and the purported action to undertake to deprive it of the title thereof in the future and in the manner so undertaken is depriving the New Amsterdam Casualty Company of its possession without due process of law, contrary to the 5th Amendment to the Constitution of the United States.

256 Wherefore, the New Amsterdam Casualty Company does pray that the court deny the motion of the Secretary of Agriculture filed in this cause, and that the court make an order directing the Clerk of this court to immediately pay over to the New Amsterdam Casualty Company the sums impounded in this cause by Harry J. Kennaley, d/b/a Harry Kennaley Commission Company, less whatever proper charges the said Clerk of the Court shall have against said impounded funds.

E. R. MORRISON,
HOMER H. BERGER.

Solicitors for New Amsterdam Casualty Company.

[Duly sworn to by Homer H. Berger jurat omitted in printing.]

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In United States District Court

[Title omitted.]

In Equity. No. 2328 and Related Cases. Nos. 2329-78

Petition for restitution of impounded funds

Filed June 11, 1938

Come now the petitioners by their attorneys, Frederick H. Wood, Thomas T. Cooke, and John B. Gage, and respectfully state:

1. That pursuant to the provisions of the certain temporary restraining or stay order entered on the 22nd day of July 1933 by this Court, and the various extensions thereof, and between the date of said order and the first day of November 1937, these petitioners deposited with the Clerk of this Court the respective amounts set forth in the schedule hereto attached, prepared by the Clerk of this Court, marked Exhibit "A" and made a part hereof, the total amount of such deposits being the sum of Five Hundred Eighty Six Thousand Ninety-three and 32/100 Dollars (\$586,093.32), in respect of which, as set out in said Exhibit "A," a lawful deduction for fees of the

Clerk, according to the statute in such cases made and provided, amounts to the sum of Five Thousand Eight Hundred Sixty and 95/100 Dollars (\$5,860.95), leaving in the Registry of this Court and in the possession and custody of the Clerk of this Court for such distribution as the Court may order, the net amount of Five Hundred Eighty Thousand Two Hundred Thirty-two and 37/100 Dollars (\$580,232.37).

258 2. This Court, pursuant to the mandate of the Supreme Court of the United States has entered herein its decree suspending, setting aside, and annulling the order of the Secretary of Agriculture dated June 14, 1933, referred to in the petition of the respective petitioners herein, and has issued its injunction granting, and under the terms of said decree, a permanent injunction restraining the defendants in respect of the enforcement of said order.

3. Each of the respective petitioners herein, plaintiffs in said action, are, respectively, entitled to prompt restitution of the net amount set out opposite their respective names in each of the respective numbered cases shown in said Exhibit "A" as the sole and exclusive property of plaintiffs, the same constituting funds of plaintiffs deposited with the Clerk of this Court pursuant to the aforesaid order of this court, equal in amount to the sum by which the rates and charges unlawfully ordered into effect by the Secretary of Agriculture under said order of June 14, 1933, exceeded the lawful Rates and Charges prescribed in Schedules and Tariffs of Rates and Charges for stockyards services properly and duly filed with the said Secretary of Agriculture at the time hereinbefore set forth.

4. The following petitioners, plaintiffs in the respectively numbered cases hereinafter set out opposite the names of such petitioners, as disclosed by affidavits filed with the Clerk of the Supreme Court on the former appeals of this case, which are made a part hereof as if set out herein, together with the affidavit of A. L. Arnold, Clerk of this Court, in respect thereto, were compelled by reason of the impoundings of funds required by said order of this Court to discontinue and are no longer engaged in business as market agencies at the Kansas City Stock Yards, as in said petitions alleged, to-wit:

259

No. of case	Name of Petitioner	Net amount impounded
2328	Fred O. Morgan, doing business as Fred O. Morgan Sheep Commission Company	\$116.38
2330	H. H. Klecker, doing business as H. H. Klecker Sheep Commission Company	916.94
2347	Henry F. Carnes, doing business as Henry F. Carnes Livestock Commission Company	472.23
2349	Drummond Standish Commission Company, a corporation	2,814.87
2356	Harry J. Kennaley, doing business as the Kennaley Commission Co.	3,031.05
2366	J. D. McCormick, doing business as D. J. McCormick Live Stock Commission Company	880.94
2369	Ben L. Welch, doing business as Welch Live Stock Commission Company	511.48
2371	W. E. Curtis, doing business as W. E. Curtis & Company	820.51
2374	Walter G. Land & John E. Maze, partners, doing business as Walter G. Land Live Stock Commission Co.	749.21
2375	Less White, doing business as Less White Live Stock Commission Co.	1,398.53
2382	Ham-Knighton, doing business as Ham-Knighton Live Stock Commission Co.	3,921.60
2372	Norman B. Greer, doing business as Greer & Company	2,136.79

5. The petitioners state that those petitioners mentioned in paragraph 4 hereof, which have discontinued business, as well as others of your petitioners have in many instances been unable to secure the funds with which to pay their proportionate share of the expenses of the prosecution of these cases, including the cost of the respective appeals had therein, that others of said petitioners have been compelled by financial stress to assign to creditors, employees and other persons part or all of such contingent right of restitution as they may have possessed with respect to their interest in said funds other than those mentioned in paragraph 4 hereof, in order to enable themselves to continue to efficiently transact their respective businesses as market agencies and to continue during said period to make the deposits aforesaid with the Clerk of this Court; that certain of petitioners have been compelled to reduce the wages of necessary employees to amounts below the compensation for which said employees were willing to continue their employment unless additional compensation was allowed to such employees for the period
260 of their continued employment, the payment of which should be contingent upon the recovery of said deposits by such petitioners. In certain instances the partnerships formerly existing and which made such deposits as plaintiffs and petitioners herein, have been dissolved. All of which, petitioners allege may in many instances make it necessary that rights of third parties originating in petitioners arising by operation of law or contract created subsequent to the actual making of said deposits must be determined or resolved in connection with the restitution and disbursement of said funds, which in equity and at law should be immediately restored and paid over to such petitioners and their respective assignees, if any, as their interests may appear.

6. Petitioners state that matters in connection with the management of the prosecution of these cases have in the past been largely handled and managed on behalf of petitioners by a committee consisting of the following named persons, all residents of Kansas City, Missouri: Bryant Poole, A. Chester Bates, Charles H. Haren, Robert A. Willis, Frank Witherspoon, E. W. Elliott, Fred H. Olander and C. A. Stuart; that each and all of said petitioners are as has been shown by the record in these cases, members of the voluntary organization known as the Kansas City Live Stock Exchange; that under the existing and valid rules of said Exchange the arbitration committees and the Board of Directors thereof are authorized and empowered to determine, after hearing and upon evidence, any controversies which may arise of a mercantile or commercial character between the members thereof; that in the event the Court should order restitution to petitioners of said amount as hereinafter prayed, petitioners believe it would be in the best interests of the parties and promote the proper distribution of said fund and restitution

261 thereof to the respective petitioners and their assignees, and the proper prompt and expeditious determination of any controversies arising with respect to interests therein, if this Court would appoint the members of said committee hereinbefore named as assistant custodians of said funds or representatives of the Court to serve as such without compensation other than the payment of their expenses as may be allowed by Court and to supervise, under the direction and control of the Court and in pursuance of such orders as it may from time to time make, the distribution and restitution of said funds and the discharge thereof from and in respect of any liens arising out of unpaid expenses, court costs, or otherwise, in connection with the prosecution of these cases, such funds to be disbursed by checks duly issued on the proper depositories by the Clerk of this Court, countersigned by such representatives of the Court, or a majority thereof, as the Court may from time to time determine.

Wherefore, your petitioners pray that this Court order and direct the Clerk of this Court, after the deduction of his lawful fees and expenses as hereinabove indicated, to make restitution as soon as may be to the respective petitioners, and each of them, in the above entitled cases of the funds so deposited by such petitioners as shown on Exhibit A hereto attached; that all claims or assignments arising under the rights herein arising on behalf of petitioners be filed with said Clerk on or before a date to be fixed by the Court, or be forever barred; that the persons hereinbefore named be appointed as representatives or assistant custodians of said funds to supervise such distribution and restitution, endeavoring, if possible, to settle and determine any controversies arising with respect to liens asserted by persons claiming under said petitioners through assignment or otherwise, to make recommendations to this Court for action
262 in respect to such distribution in order that it may be assured that it be accomplished and carried out expeditiously, fairly, and economically, and for such other and further orders as to the Court may seem meet and proper in the premises.

Dated this 11th day of June, 1938.

FREDERICK H. WOOD,
JOHN B. GAGE,
THOMAS T. COOKE.
Attorneys for Petitioners.

THOMAS T. COOKE,
CARSON E. COWHERD,
Of Counsel.

263 [Duly sworn to by Frederick H. Olander; jurat omitted in printing.]

Case No.	Firm name	Collections	Earnings	Net amounts
2328	Fred O. Morgan Sheep Comm. Co.	\$117.56	\$1.18	\$116.
2329	Ragland, Storts & Burris	11,083.27	110.83	10,972.
2330	Hinie Klecker Sheep Com. Co.	926.20	9.26	916.
2331	Lewis-Flournoy L. S. Comm. Co.	2,386.40	23.87	2,362.
2332	Maxwell-Furnish L. S. Com. Co.	10,817.13	108.17	10,708.
2333	John M. Nichols L. S. Com. Co.	2,368.26	23.68	2,344.
2334	Bowles, L. S. Com. Co.	12,745.12	127.45	12,617.
2335	Crider Brothers Com. Co.	13,588.62	135.89	13,452.
2336	Charles Dixon Com. Co.	14,299.42	142.99	14,156.
2337	Elliott, Swain & Co.	3,727.71	37.28	3,690.
2338	Farrar, Davis & Campbell L. S. Com. Co.	6,609.42	66.09	6,543.
2339	Gladish L. S. Com. Co.	3,162.05	31.62	3,130.
2340	Haggart-Wilson L. S. Com. Co.	15,074.75	150.75	14,924.
2341	Kansas City L. S. Com. Co.	8,292.30	82.92	8,209.
2342	Fern O. Sanders L. S. Com. Co.	5,537.17	55.37	5,481.
2343	Stuart-Robinson-Hoover Co.	9,868.64	98.69	9,769.
2344	Wester Brothers & Smith Com. Co.	13,815.19	138.15	13,677.
2345	The Stagner, Pieronnet & Wilson L. S. Com. Co.	10,562.18	105.62	10,456.
2346	Tamblyh Com. Co.	5,159.92	51.60	5,108.
2347	H. F. Carnes L. S. Com. Co.	477.00	4.77	472.
2348	Warren Cummings L. S. Com. Co.	12,283.65	122.83	12,160.
2349	Drumm-Standish Com. Co.	2,843.30	28.43	2,814.
2350	Link-Faskin			
2351	Long-Perry L. S. Com. Co.	21,639.54	216.40	21,423.
2352	Knight & Tice Sheep Com. Co.	2,860.60	28.61	2,831.
2353	W. M. Leitch Sheep Com. Co.	7,851.68	78.52	7,773.
2354	National L. S. Com. Co.	34,131.03	341.31	33,789.
2355	Poole-Dempsey-Rutherford L. S. Com. Co.	15,282.90	152.83	15,130.
2356	Harry Kenalley Com. Co.	3,064.70	30.65	3,034.
2357	Brake-Martin L. S. Com. Co.	9,357.90	93.58	9,264.
2358	John Clay & Co.	64,234.32	642.34	63,591.
2359	Wright & Baccus L. S. Com. Co.	10,659.17	106.59	10,552.
2360	Swift & Henry L. S. Com. Co.	52,980.50	529.81	52,450.
2361	H. Theis & Sons	5,485.65	54.86	5,430.
2362	Ham Knighton L. S. Com. Co.	3,961.21	39.61	3,921.
2363	Laird Brothers L. S. Com. Co.	12,445.90	124.46	12,321.
2364	Martin, Bloomquist & Lee Com. Co.	33,020.80	330.21	32,690.
2365	Moffett L. S. Com. Co.	13,209.38	132.09	13,136.
2366	Jay D. McCormick L. S. Com. Co.	889.84	8.90	880.
2367	Kile Com. Co.	13,472.65	134.73	13,337.
2368	Ryan-Robinson Com. Co.	15,756.85	157.57	15,599.
2369	Welch Livestock Com. Co.	511.39	5.11	506.
2370	Witherspoon Livestock Com. Co.	20,128.27	201.28	19,926.
2371	W. E. Curtis & Co.	828.80	8.29	820.
2372	Greer & Company	2,158.37	21.58	2,136.
2373	Inman-Hutton L. S. Com. Co.	4,436.10	44.36	4,391.
2374	Walter G. Land L. S. Com. Co.	756.78	7.57	749.
2375	Less White L. S. Com. Co.	1,917.71	19.18	1,898.
2376	Wilson, Egan & Co.	32,295.92	322.96	31,972.
2378	Cassity S. W. Com. Co.	16,540.16	165.40	16,374.
2377	Burlington L. S. Com. Co.	20,410.53	204.11	20,206.
	Funds Deposited with Court	\$586,098.32		
	Earnings of 1%		\$5,860.45	
	Net Amounts			\$580,237.

[Title omitted.]

In Equity. No. 2328 and Related Cases. No. 2329-78

Order on motion, restitution

Filed June 18, 1938

This cause coming on to be heard upon the petition of plaintiff for an order of this court for the restitution to the respective plaintiffs of impounded funds heretofore respectively deposited by the

with the clerk of this court herein and in the possession and custody of said clerk, between July 22, 1933, and November 1, 1937, under a temporary restraining order of this court issued hereon on July 22, 1933, and various extensions thereof, and the court having considered said petition and having heard the evidence with respect thereto and the arguments of counsel for plaintiffs and defendants for and against said petition and the order prayed for thereunder, and being fully advised concerning the matter, finds that this court in accordance with the mandate of the Supreme Court of the United States has entered herein its final decree suspending, setting aside, and annulling the order of the Secretary of Agriculture of the United States dated June 14, 1933, sought to be enjoined by plaintiffs in this action and permanently enjoining the defendants from enforcing said order of said Secretary, and that said respective plaintiffs are, therefore, entitled to the restitution of said impounded funds in the respective amounts as hereinafter set out and in accordance with the prayer of said plaintiffs herein for restitution.

It is, therefore, ordered, adjudged, and decreed that:

1. The aggregate amount of funds impounded with the clerk of this court in this case is Five Hundred Eighty Six Thousand Ninety Three and 32/100 (\$586,093.32) Dollars; and that the amount paid into said fund by each plaintiff, the amount to be deducted therefrom as to each plaintiff for the payment of fees the clerk is entitled to in respect thereof, and the net amount to be restored and refunded on account of each such plaintiff is fully set out in "Exhibit A," hereto attached and made a part thereof.

2. The court appoints the following persons, to-wit: Bryant Poole, A. Chester Bates, Charles H. Harem, Robert A. Willis, Frank Witherspoon, E. W. Elliott, Fred H. Olander, and C. A. Stuart, all residents of Kansas City, Missouri, and all members of the voluntary organization known as the Kansas City Live Stock Exchange, Kansas City, Missouri, as assistant custodians of said impounded funds to assist the clerk of this court, heretofore appointed and acting as custodian of said funds, in the payment, distribution, and restitution thereof; and to this end said assistant custodians shall supervise, under the direction and control of this court and in pursuance of such orders as it may from time to time make, the payment, distribution, and restitution thereof, and the settling and determination of any and all questions and controversies arising with respect to any and all claims and liens on said impounded funds or any part thereof asserted within the time hereinafter specified by any person or persons under said respective plaintiffs through assignment or otherwise, and arising also in respect of any liens for unpaid expenses, court costs, or otherwise, in connection with the prosecution of this suit: said assistant custodians shall serve as such without compensation, but they shall be entitled to reimbursement for such expenses as they may incur in connection therewith as may be determined and allowed by this court; and that such impounded

funds shall be paid and distributed only by check or checks drawn on the depository or depositories thereof, signed by the clerk of this court and countersigned by such assistant custodians or by a majority of such assistant custodians.

3. The court directs that said custodian and assistant custodian shall pay and distribute said impounded funds as follows:

(a) They shall first pay to the clerk of said court the sum of Five Thousand Eight Hundred Sixty and 95/100 (\$5,860.95) Dollars in payment of fees that he is entitled to by law and as such custodian.

(b) They shall then pay, distribute, and restore to each plaintiff his part of the remainder of said impounded funds as shown by "Exhibit A" referred to Paragraph 1 hereof, after deducting from the amount deposited into said fund by each plaintiff the amount to be paid to said clerk as fees as hereinbefore provided; provided, however, that if any claims or liens are asserted by assignment or otherwise or on account of unpaid expenses, court costs, or otherwise, in connection with the prosecution of these cases, to the refund or refunds or any part thereof that any plaintiff or plaintiffs would otherwise be entitled to hereunder, said assistant custodians, under the supervision and control of this court and subject to court order or orders in respect thereof, shall settle and determine such claims and liens

and the rights of the parties with respect thereto, the court
268 retaining full jurisdiction to make any and all further orders in regard to the payment and distribution thereof and the determination of the rights of particular parties to receive the funds and any and all other matters in connection therewith, except any such claims or liens must be filed with said custodian on or before July 11, 1938, or be forever barred from distribution under this order.

4. The court expressly reserves power and authority and retains jurisdiction as respects taxation and assessment of costs and allowance for fees to its officers and appointees for services already rendered or hereafter rendered, including expenses incurred by them with respect thereto, and to make further orders with respect of distribution of said impounded funds, and to take any action deemed necessary to effectuate the purposes of this order; jurisdiction over all persons or parties affected by this order is reserved for the purpose of effectuating this order.

Entered this 18 day of June, 1938.

ARBA S. VAN VALKENBURGH,
Judge of the Circuit Court.

ALBERT L. REEVES,
Judge of the District Court.

MERRILL E. OTIS,
Judge of the District Court.

200 Stockyards Cases—Equity 2328 to 2378, inclusive—Page 171

Case No.	Firm name	Collections	Earnings	Net amounts
2328	Fred O. Morgan Sheep Comm. Co.	\$177.56	\$1.18	\$116.38
2329	Ragland, Storts & Burris	11,083.27	110.83	10,972.44
2330	Hinie Klecker Sheep Com. Co.	926.20	0.25	916.94
2331	Lewis-Flourney L. S. Comm. Co.	2,386.40	23.87	2,362.53
2332	McWell-Furnish L. S. Com. Co.	10,817.13	108.17	10,708.96
2333	John M. Nichols L. S. Com. Co.	2,368.26	23.68	2,344.58
2334	Bowles L. S. Com. Co.	12,745.12	127.45	12,617.67
2335	Orider Brothers Com. Co.	13,568.62	135.89	13,432.73
2336	Charles Dixon Com. Co.	14,299.42	142.99	14,156.43
2337	Elliott, Swain & Co.	3,727.71	37.28	3,690.43
2338	Farrar, Davis & Campbell L. S. Com. Co.	6,609.42	66.09	6,543.33
2339	Gladish L. S. Com. Co.	3,162.05	31.62	3,130.43
2340	Haggart-Wilson L. S. Com. Co.	15,074.75	150.75	14,924.00
2341	Kansas City L. S. Com. Co.	8,292.30	82.92	8,209.38
2342	Fern O. Sanders L. S. Com. Co.	5,537.17	55.37	5,481.80
2343	Stuart-Robinson-Hoover Co.	9,868.64	98.69	9,769.95
2344	Wester Brothers & Smith Com. Co.	13,815.19	138.15	13,677.04
2345	The Stagner, Pieronnet & Wilson L. S. Com. Co.	10,562.18	105.62	10,456.56
2346	Tamblyn Com. Co.	5,159.92	51.60	5,108.32
2347	H. F. Carnes L. S. Com. Co.	477.00	4.77	472.23
2348	Warren Cummings L. S. Com. Co.	12,283.05	122.83	12,160.22
2349	Drumm-Standish Com. Co.	2,843.30	28.43	2,814.87
2350	Link-Faskin			
2351	Long-Perry L. S. Com. Co.	21,639.54	216.40	21,423.14
2352	Knight & Tice Sheep Com. Co.	2,860.60	28.61	2,831.99
2353	W. M. Leiten Sheep Com. Co.	7,851.68	78.52	7,773.16
2354	National L. S. Com. Co.	34,131.03	341.31	33,789.72
2355	Poole-Dempsey-Rutherford L. S. Com. Co.	15,282.90	152.83	15,130.07
2356	Harry Kenalley Com. Co.	3,064.70	30.65	3,034.05
2357	Xhrke-Martin L. S. Com. Co.	9,357.90	93.58	9,264.32
2358	John Clay & Co.	64,234.32	642.34	63,591.98
2359	Wright & Bacus L. S. Com. Co.	10,659.17	106.59	10,552.58
2360	Swift & Henry L. S. Com. Co.	52,980.50	529.81	52,450.69
2361	H. Theis & Sons	5,485.65	54.86	5,430.79
2362	Ham Knighton L. S. Com. Co.	3,961.21	39.61	3,921.60
2363	Laird Brothers L. S. Com. Co.	12,445.90	124.46	12,321.44
2364	Martin, Bloomquist & Lees Com. Co.	33,020.80	330.21	32,690.59
2365	Moffett L. S. Com. Co.	13,269.38	132.69	13,136.69
2366	Jay D. McCormick L. S. Com. Co.	869.84	8.90	860.94
2367	Kile Com. Co.	13,472.65	134.73	13,337.92
2368	Ryan-Robinson Com. Co.	15,759.85	157.57	15,599.28
2369	Welch Livestock Com. Co.	511.39	5.11	506.28
2370	Witherspoon Livestock Com. Co.	20,128.27	201.28	19,926.99
2371	W. E. Curtis & Co.	828.80	8.29	820.51
2372	Greer & Company	2,158.37	21.58	2,136.79
2373	Inman-Hutton L. S. Com. Co.	4,436.10	44.36	4,391.74
2374	Walter G. Land L. S. Com. Co.	759.78	7.57	749.21
2375	Less White L. S. Com. Co.	1,917.71	19.18	1,898.53
2376	Wilson, Egan & Co.	32,295.93	322.96	31,972.97
2377	Cassidy S. W. Com. Co.	16,540.16	165.40	16,374.76
2378	Burlington L. S. Com. Co.	20,410.53	204.11	20,206.42
	Funds deposited with court	\$586,093.32		
	Earnings of 1%		\$5,860.95	
	Net amounts			\$580,232.37

270 In United States District Court

In Equity. No. 2328 and Related Cases Nos. 2329-78

[Title omitted.]

Final decree

Filed June 18, 1938

Come now the said plaintiffs by their attorneys and the defendants by their attorney and the mandate of the Supreme Court of the United States having been filed in this court duly authenticated under the seal of the said Supreme Court and certified by the court thereof,

wherefore it appears that at the October Term of said Supreme Court, on the 25th day of April 1928, upon appeal by the said plaintiffs from the decree of this court, the said Supreme Court entered and pronounced a judgment and decree reversing the decree of this court entered herein on the 9th day of July 1937:

Now, therefore, on the filing of said mandate, and in pursuance thereof, and after hearing the respective parties, it is ordered, adjudged, and decreed, and this court by virtue of the power and authority therein invested, and in obedience to the said mandate, doth adjudge and decree:

1. The decree entered herein on July 9, 1937, is hereby vacated, set aside, and for naught held.

2. The purported order of the defendant, the Secretary of Agriculture of the United States, of June 14, 1933, referred to and made a part of the petitions of the respective plaintiffs as Exhibit 271 "A," and the same is hereby decreed void and of no effect, and is permanently suspended, enjoined, set aside, and annulled, and the defendant, Henry A. Wallace, Secretary of Agriculture, and each and all of the officers, attorneys, solicitors, and agents of the United States, and all other persons acting or claiming or assuming to act, by or under the authority of the defendants, or either of them, are hereby forever restrained and enjoined from instituting, prosecuting, or aiding in instituting or prosecuting any proceeding or action in respect of the enforcement, operation, or execution of said order, and each and every part thereof.

And it is further adjudged and decreed that such other proceedings be had herein in conformity to the opinion of said Supreme Court with reference to the distribution or restitution of funds deposited by plaintiffs in the Registry of this Court with the Clerk thereof pursuant to the provisions of the temporary restraining order entered on the 22nd day of July 1933 as to law and justice may appertain, and that the parties may apply to this Court upon the foot of this decree for such further orders and directions as may be necessary or seem meet and proper to the court with respect to the funds and moneys so impounded and the costs of this action.

ARBA S. VAN VALKENBURGH,

*Judge of the Circuit Court of Appeals
of the United States for the Eighth Circuit.*

ALBERT L. REEVES, *District Judge.*

MERRILL E. OTIS, *District Judge.*

272

In United States District Court

[Title omitted.]

Petition for appeal

Filed June 29, 1938

To the Honorable Arba S. Van Valkenburgh, Judge of the Circuit Court of the United States for the Eighth Circuit, the Honorable

Merrill E. Otis, Judge of the District Court of the United States for the Western District of Missouri, and the Honorable Albert L. Reeves, Judge of the District Court of the United States for the Western District of Missouri, sitting as a district court for said District, pursuant to section 316 of the Packers and Stockyards Act of August 15, 1921 (c. 64, 42 Stat. 168; U. S. C., Tit. 7, Sec. 217), the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 220; U. S. C., Tit. 28, Secs. 44 and 47a), and the Act of February 13, 1925 (c. 229, 43 Stat. 938; U. S. C., Tit. 28, Sec. 345):

The United States of America and the Secretary of Agriculture, defendants in the above-entitled cause, considering themselves aggrieved by the final order and decree entered by this Court on June 18, 1938, which granted petitioners' motion for the restitution of all impounded funds theretofore deposited by them with the Clerk of this Court between July 22, 1933, and November 1, 1937, pursuant to the terms of a temporary restraining order issued by this
273 Court on July 22, 1933, and extended from time to time thereafter, do hereby pray an appeal from said final order and decree to the Supreme Court of the United States pursuant to section 316 of the Packers and Stockyards Act of August 15, 1921 (c. 64, 42 Stat. 168; U. S. C., Tit. 7, Sec. 217), the Urgent Deficiencies Act of October 22, 1913 (c. 32, Stat. 220; U. S. C., Tit. 28, Secs. 44 and 47a), and the Act of February 13, 1925 (c. 229, 43 Stat. 938; U. S. C., Tit. 28, Sec. 345).

The particulars wherein the defendants consider the order erroneous are set forth in the Assignment of Errors accompanying this petition and to which reference is hereby made.

Said defendants pray that their appeal may be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings, and documents upon which said final order and decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

MAURICE M. MILLIGAN,

United States Attorney,

THURMAN ARNOLD,

Assistant Attorney General,

WENDELL BERGE,

Special Assistant to the Attorney General,

For the United States of America.


This 27 day of June 1938.

Service of the foregoing Petition for Appeal and the receipt of a copy thereof are hereby acknowledged this 29 day of June 1938.

FREDERICK H. WOOD,

JOHN B. GAGE,

Solicitors for Petitioners.



[Title omitted.]

In Equity. No. 2328 and Nos. 2329-2378

Assignment of errors

Filed June 29, 1938

The United States of America and the Secretary of Agriculture, defendants in the above-entitled cause, in connection with their petition for an appeal to the Supreme Court of the United States, hereby assign error to the record and proceedings and to the entry of the final order and decree of said District Court on the 18th day of June, 1938, in the above-entitled cause, and say that said decree is erroneous and to the prejudice of said defendants in the following particulars:

1. The Court erred in denying defendants' motion requesting the Court to enter an order staying all further proceedings herein and to direct the Clerk of said District Court to retain in his custody the moneys impounded in said Court pursuant to its interlocutory order of July 22, 1933, and continued in effect from time to time thereafter, by further orders of the Court, until such time as the Secretary of Agriculture proceeding with due expedition shall have entered a final order in the proceeding reopened by him by an order dated June 1, 1938, and such final order shall have become effective or its merits have been finally adjudicated by a court of competent jurisdiction.

2. The Court erred in granting petitioners' motion for restitution of all impounded funds theretofore deposited by them with the Clerk of said Court between July 22, 1933, and November 1, 1937, pursuant to the terms of a temporary restraining order issued by the said Court on July 22, 1933, and extended from time to time thereafter.

3. The Court erred in holding that as a matter of law the funds now impounded in the custody of the Clerk belong to petitioners.

4. The Court erred in holding that the said funds were deposited with the said Clerk upon the clear understanding that if the order of the Secretary dated June 14, 1933, should be held invalid and its enforcement enjoined the said funds would be returned to petitioners.

5. The Court erred in holding that as a matter of law the Secretary of Agriculture has no authority in the circumstances of this case to make an order, effective as of June 14, 1933, which will determine reasonable rates and charges for the period between July 24, 1933 and November 1, 1937.

6. The Court erred in directing the distribution to petitioner of the said impounded moneys prior to a determination upon the merit by the Secretary of Agriculture or by the Court of the ultimate ownership of said moneys.

7. The Court erred in directing the distribution to petitioners of the said moneys now impounded in the custody of the Clerk prior to any determination upon the merits by the Secretary of Agriculture or by the Court of the reasonableness of the rates and charges under which the said moneys were collected by petitioners from their patrons.

276 8. The Court erred in failing to hold that the funds now impounded in the custody of the Clerk should be retained in the custody of the said Clerk until such time as the Secretary of Agriculture, acting with due expedition, shall have made a final order, dated as of June 14, 1933, fixing the reasonable rates and charges to be charged by the petitioners for the period between July 24, 1933, and November 1, 1937.

9. The Court erred in failing to enter such order or orders with respect to the impounded funds as was and is consistent with right and justice and the laws of the United States.

MAURICE M. MILLIGAN,
United States Attorney,

THURMAN ARNOLD,
Assistant Attorney General,

WENDELL BERGE,
Special Assistant to the Attorney General.
Solicitors for Defendants.

This 27 day of June, 1938.

Service of the foregoing Assignment of Errors and the receipt of a copy thereof are hereby acknowledged this 29th day of June 1938.

FREDERICK H. WOOD,

JOHN B. GAGE,

Solicitors for Petitioners.

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In the United States District Court

[Title omitted.]

In Equity. No. 2328 and Nos. 2329-2378

Notice to the Attorney General of the State of Missouri

Filed June 29, 1938

To the Honorable the Attorney General of the State of Missouri, at Jefferson City, Missouri:

Pursuant to the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 220-221; U. S. C. Tit. 28, sec. 47a), you are hereby notified that the defendants in the above-entitled cause have taken an appeal to the Supreme Court of the United States from the final decree of the District Court of the United States for the Western District of Mis-

souri, entered on June 18, 1938. The order allowing appeal makes the same returnable within 40 days from the date thereof.

MAURICE M. MILLIGAN,
United States Attorney,
THURMAN ARNOLD,
Assistant Attorney General,
WENDELL BERGE,

*Special Assistant to the Attorney General,
For the United States of America.*

This 27th day of June, 1938.

278 Service of the foregoing Notice and the receipt of a copy thereof are hereby acknowledged this 28th day of June 1938.

ROY MCKITTRICK,
Attorney General, State of Missouri.

279 In United States District Court

[Title omitted.]

In Equity. No. 2328 and Nos. 2329-2378

Order allowing appeal

Filed June 30, 1938

In the above-entitled cause the United States of America and the Secretary of Agriculture, defendants, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order and decree of this Court in this cause entered on the 18th day of June 1938, which granted petitioners' motion for the restitution of all impounded funds theretofore deposited by them with the Clerk of this Court between July 22, 1933, and November 1, 1937, pursuant to the terms of a temporary restraining order issued by this Court on July 22, 1933, and extended from time to time thereafter, and having also made and filed an Assignment of Errors and a Statement of Jurisdiction, and having in all respects conformed to the statutes and rules of court in such cases made and provided, it is

Ordered and decreed that the appeal be, and the same is hereby, allowed as prayed for.

ARBA S. VAN VALKENBURGH,
Judge of the Circuit Court.

ALBERT L. REEVES,
Judge of the District Court.

MERRILL E. OTIS,
Judge of the District Court.

This 30th day of June 1938.

280 Service of the foregoing Order Allowing Appeal and the receipt of a copy thereof are hereby acknowledged this 30 day of June 1938.

FREDERICK H. WOOD,
JOHN B. GAGE,
Solicitors for Petitioners.

In United States District Court

[Title omitted.]

In Equity. No. 2328 and Nos. 2329-2378

Præcipe for transcript of record

Filed June 30, 1938

To the CLERK:

Please prepare a transcript of the record in the above-entitled cause in the matter of appeals therein and include in said transcript in the order given below the following matters, viz:

1. Petition filed by F. O. Morgan, doing business as F. O. Morgan Sheep Commission Company, in the United States District Court for the Western District of Missouri on July 19, 1933;
2. Defendants' answer to said petition, dated November 25, 1933;
3. Statement as to petitions filed in cases Nos. 2329 to 2378, inclusive.
4. Opinions, findings of fact, and conclusions of law of the said District Court, dated October 29, 1934;
5. Decree of the said District Court, dated December 20, 1934;
6. Petition for rehearing filed in the said District Court.
- 284 7. Order, dated January 2, 1935, granting leave to file petition for rehearing;
8. Opinion of the said District Court, dated June 20, 1935, on petition for rehearing;
9. Stipulation, dated June 15, 1935, as to consolidation of causes;
10. Order, dated June 15, 1935, consolidating causes.
11. Mandate of the Supreme Court of the United States, dated May 25, 1936;
12. Supplemental answer of defendants, dated July 11, 1936;
13. Amended application of petitioners for leave to amend petitions, dated September 17, 1936.
14. Order, dated November 6, 1936, granting leave to amend petitions;
15. Defendants' answer, dated December 4, 1936, to petitions as amended;
16. Opinions of the said District Court, dated July 2, 1937;
17. Decree of the District Court dated July 9, 1937;
18. Temporary restraining order dated July 22, 1933;
19. Order dated September 19, 1933, continuing temporary restraining order;
20. Order dated June 20, 1935, denying petitions for rehearing and entering joint and final decree in cases as consolidated;
21. Order dated August 16, 1937, continuing temporary restraining order and staying operation of order of Secretary of Agriculture dated June 14, 1933, pending appeal to the Supreme Court of the United States from the said District Court's decree of July 9, 1937;
22. Mandate of the Supreme Court of the United States dated June 3, 1938;

285 23. Defendants' motion, dated June 11, 1938, for an order staying further proceedings in the above-entitled cause and requesting the retention by the Clerk of the said District Court of moneys impounded in said Court pursuant to its interlocutory order of July 22, 1933, continued from time to time thereafter by further orders of the said Court, until such time as the Secretary proceeding with due expedition shall have entered a final order in the proceeding reopened by him by order of June 1, 1938, and such order shall have become effective or its merits have been finally adjudicated by a court of competent jurisdiction;

24. Petitioners reply to defendants' aforesaid motion;

25. Answer of New Amsterdam Casualty Company, substituted for Harry J. Kennaley, to defendants' aforesaid motion;

26. Petitioners' motion dated June 11, 1938, for the restitution of all impounded funds theretofore deposited by them with the Clerk of this Court between July 22, 1933, and November 1, 1937, pursuant to the terms of a temporary restraining order issued by this Court on July 22, 1933, and extended from time to time thereafter;

27. Opinion entered in the said District Court on June 18, 1938, by Circuit Judge Arba S. Van Valkenburgh and District Judges Albert L. Reeves and Merrill E. Otis;

28. Final order and decree entered by said District Court on June 18, 1938;

29. Final decree of said District Court dated June 18, 1938, setting aside its former decree of July 9, 1937, and permanently enjoining the order of the Secretary of Agriculture dated June 14, 1933;

30. Defendants' petition for appeal to the Supreme Court of the United States;

31. Said District Court's order allowing appeal to the Supreme Court of the United States;

286 32. Defendants' assignment of errors filed with said petition for appeal;

33. Notice of appeal to Roy McKittrick, Attorney General of the State of Missouri;

34. Defendants' praecipe for record on appeal and acknowledgment of service thereon;

35. Citation and writ of service;

36. Any orders of this Court not herein enumerated subsequent to the filing of the aforesaid mandate of the Supreme Court of the United States.

MAURICE M. MILLIGAN,
United States Attorney,

THURMAN ARNOLD,
Assistant Attorney General,

WENDELL BERGE,
Special Assistant to the Attorney General,

Solicitors for the defendants.

287 Services of the foregoing Praecipe for Transcript of Record
and the receipt of a copy thereof are hereby acknowledged this
30th day of June 1938.

FREDERICK H. WOOD,
JOHN B. GAGE,
Solicitors for Appellees.

Filed in the United States District Court June 30, 1938.

288 In United States District Court

[Title omitted.]

In Equity. No. 2328 and Nos. 2329-2378

Stipulation re Exhibit No. 24

Filed July 16, 1938

It is hereby stipulated and agreed that Exhibit No. 24 offered by appellees in the administrative proceedings, being copy of "Arbitrators' Award in Dockets 11, 12, 13, and 14," be included in and made a part of the transcript of record to be certified by the Clerk in the above entitled proceeding.

Dated July 14, 1938.

FREDERICK H. WOOD,
JOHN B. GAGE,
Attorneys for Appellees.
WENDELL BERGE,
Attorney for Appellants.

289 UNITED STATES DEPARTMENT OF AGRICULTURE,
PACKERS AND STOCKYARDS ADMINISTRATION,
Washington, D. C., July 31, 1923.

The Honorable THE SECRETARY OF AGRICULTURE.

SIR: We submit, herewith, the report and the award of the arbitrators in Docket Nos. 11, 12, 13, and 14.

(Signed) G. N. DAGGER.

(Signed) HOWARD M. GORE.

Docket Nos. 11, 12, 13, and 14

AMERICAN NATIONAL LIVE STOCK ASSOCIATION, NATIONAL WOOL GROWERS' ASSOCIATION, ARIZONA CATTLE GROWERS' ASSOCIATION, ARIZONA WOOL GROWERS' ASSOCIATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, CORN BELT MEAT PRODUCERS' ASSOCIATION, IDAHO CATTLE AND HORSE GROWERS' ASSOCIATION, MONTANA STOCK GROWERS' ASSOCIATION, NEBRASKA STOCK GROWERS' ASSOCIATION, NEVADA LAND AND LIVE STOCK ASSOCIATION, NEW MEXICO CATTLE AND HORSE GROWERS' ASSOCIATION, OREGON CATTLE AND HORSE RAISERS' ASSOCIATION, TEXAS AND SOUTHWESTERN CATTLE RAISERS' ASSOCIATION, UTAH CATTLE AND HORSE GROWERS' ASSOCIATION, WYOMING STOCK GROWERS' ASSOCIATION, COMPLAINANTS

v.

THE CHICAGO LIVE STOCK EXCHANGE, THE KANSAS CITY LIVE STOCK EXCHANGE, THE OMAHA LIVE STOCK EXCHANGE, THE ST. PAUL LIVE STOCK EXCHANGE, THE PORTLAND LIVE STOCK EXCHANGE; AND THOSE MARKET AGENCIES OPERATING AT THE STOCKYARDS AT CHICAGO, ILL.; KANSAS CITY, MO.; OMAHA, NEBR.; ST. PAUL, MINN.; PORTLAND, ORE.; AND FORT WORTH, TEXAS, THAT HAVE REGISTERED WITH THE SECRETARY OF AGRICULTURE UNDER SECTION 303 OF THE PACKERS AND STOCKYARDS ACT, 1921, DEFENDANTS

Report and Award of the Arbitrators Recommended to the Secretary of Agriculture

A formal complaint was filed with the Secretary of Agriculture on July 25th, 1922, under Title III of the Packers and Stockyards Act, 1921. This complaint alleges, among other things, that the commission charges assessed and collected by the market agencies for selling livestock at the stockyards located at Kansas City, Mo., So. Omaha, Neb., So. St. Paul, Minn., and Chicago, Ill., are unjust, unreasonable, and discriminatory.

Before a date of hearing was ordered on this complaint, a conference was held between the representatives of the market agencies at the Kansas City market and representatives of the American National Livestock Association, Kansas Livestock Association, Missouri Livestock Association, Texas and Southwestern Cattle Raisers' Association, and other livestock organizations tributary to that market. This conference resulted in a proposal to the Secretary that the issues in dispute be settled by arbitration. The conference nominated arbitrators for the consideration of the Secretary in connection with this proposal. The proposed plan was approved by the Secretary of Agriculture. All parties to the proceedings and participants in the conferences in relation thereto, with the approval and consent of the Secretary, joined in an invitation to those nomi-

noted by them to act in the capacity of arbitrators under the following stipulation:

"In conference in regard to the matter of rates, charges, regulations, and practices now in force at the Kansas City market, it is proposed that all questions in regard to the above subject matter shall be submitted for adjustment to G. N. Dagger, Charge of the Division of Rates and Charges, and Howard M. Gore, Charge of Trade Practice Division, Packers and Stockyards Administration, and it is agreed that their decision shall be accepted and made a part of the conference report, the same to be made effective by the Kansas City Live Stock Exchange upon approval by the Secretary of Agriculture. In performance of these duties, G. N. Dagger and Howard M. Gore may proceed in such manner and by such means as they deem necessary, and shall be afforded such facilities and information as they may require for the proper discharge of their duties. And in order to effectuate the results of this conference, it is understood that the representatives of the commission men market agencies, the American National Live Stock Association, the National Wool Growers' Association, and the producers organizations, namely: Kansas State Live Stock Association, Texas and South Western Cattle Raisers' Association, Missouri Live Stock Association, and representatives of Oklahoma Live Stock Producers participating in this conference will approve this stipulation."

292 The persons chosen and named in the stipulations accepted the invitation to act as arbitrators and entered upon their duties as such. The arbitrators were aware that the tasks to be undertaken were in the nature of pioneer work and the complex character of the problems presented would necessitate extensive research and study. It was the opinion of the arbitrators that the problem could best be approached by informal conferences and hearings with the representatives of the producers and shippers and with the market agencies engaged in business at the market under consideration. It was the further belief of the arbitrators that the Auditing Division of the Packers and Stockyards Administration should make an examination of the records of these market agencies and report the facts developed to the arbitrators.

The arbitration plan of settling the questions at issue for St. Paul, Omaha, and Chicago was adopted in January 1923. The complainants and respondents at Omaha and St. Paul adopted the form of the Kansas City stipulation. A separate stipulation was entered into for Chicago, which reads as follows:

"It is hereby agreed between the complainants in the above entitled complaint and The Chicago Live Stock Exchange and all market agencies, members thereof, who are made defendants to said complaint, as follows:

"1. In lieu of the formal procedure and hearing provided for by the Packers and Stockyards Act, 1921, for the consideration and determination of the charges made in said complaint by the American

National Live Stock Association and others against The Chicago Live Stock Exchange and others, the entire subject matter and charges in said complaint, contained shall be investigated by G. N. Dagger, in charge of the Division of Rates and Charges of said Packers and Stockyards Administration; and Howard M. Gore, in charge of the Trade Practice Division of said Packers and Stockyards Administration, with full authority in said G. N. Dagger and Howard M. Gore, as arbitrators, to finally adjust and determine the issue raised by said complainants in their complaint against said Chicago Live Stock Exchange and the market agencies at the Chicago market.

295 "2. Upon the signing of this stipulation by the parties hereto, the schedule of rates and charges now on file with said Packers and Stockyards Administration shall remain in effect until the decision of said arbitrators is approved by the Secretary of Agriculture, and none of the parties hereto shall take any action in respect to the matters charged and referred to in said complaint pending the determination thereof by said arbitrators, for the purpose of concluding the proceedings instituted by the complainants.

"3. In performing their duties as such arbitrators, said G. N. Dagger and Howard M. Gore shall proceed in such manner and by such means as they deem necessary and proper and shall be extended by the complainants and these defendants all facilities and give all information as they may request and as in their judgment necessary for the proper discharge of their duties as such arbitrators and to enable them to fairly determine what shall be regarded as just and reasonable practices and schedules of rates and commission charges in the livestock commission business at the Chicago market.

"4. It is understood that the decision of such arbitrators upon the matters herein referred to shall be binding upon, and shall be accepted by all of the parties to the complaint, and that the rates and charges and practices found to be just and reasonable by said arbitrators and recommended by them shall be adopted by said Chicago Live Stock Exchange and the members thereof, upon approval by the Secretary of Agriculture, and shall be made effective to the same extent and as fully as if such decision and recommendations had been arrived at by the Secretary of Agriculture as the result of a formal hearing in accordance with the procedure provided by said Packers and Stockyards Act, 1921.

"5. The practices and rates and charges found to be just and reasonable by said arbitrators and recommended by them for adoption, if approved by the Secretary of Agriculture, shall be adopted by all of the market agencies at the Chicago market and enforced by the Packers and Stockyards Administration.

"6. No publicity shall be given to the information gathered by said arbitrators by either the complainants or the defendants herein and no public statements or interviews with respect thereto given out, unless by authority or direction of said arbitrators.

"7. That this stipulation shall be executed in quadruplicate and one copy given to each of the following:

"(a) The Chief of the Packers and Stockyards Administration.

"(b) Messrs. G. N. Dagger and Howard M. Gore; the arbitrators.

"(c) The duly authorized representative of the complainants.

"(d) The President of The Chicago Live Stock Exchange.

294 "8. The investigation by the arbitrators herein shall commence as soon as conveniently possible after the execution of this stipulation and shall be concluded within such reasonable time as the circumstances will permit.

"9. The recommendations, conclusions, and decisions of said arbitrators shall be reduced to writing and a copy thereof filed with the Packers and Stockyards Administration and a copy thereof delivered to the representative of the complainants and the President of The Chicago Live Stock Exchange. Such recommendations as to practices, rates, and schedules of commission charges and otherwise, as may be contained in said decision and report, when approved by the Secretary of Agriculture, shall be adopted by said Chicago Live Stock Exchange and the market agencies at the Chicago market and made effective as soon as conveniently possible after the receipt by the president of The Chicago Live Stock Exchange of said report of the arbitrators, or at such time as shall be directed by said arbitrators."

An informal public hearing was held in the Kansas City market during the week of October 30th, 1922. During the week of February 19th, 1923, an informal public hearing was had at St. Paul, Minn. The hearing at Chicago was held during the week beginning March 5th, 1923, which was resumed March 30th, 1923. The hearing at Omaha was held during the week beginning March 26th, 1923. These informal public hearings held by the arbitrators at the respective markets were widely announced and full opportunity was given to all interested parties to present information and suggestions bearing upon the reasonableness of the present commission charges. Market agencies, individual producers, and representatives of livestock organizations were present at all the hearings and submitted their views and recommendations to the arbitrators. Exhibits were submitted setting forth statistical data and other information bearing on the issue. A complete record was made of these proceedings. An invitation was extended to those present at the hearings and all others interested to present to the arbitrators any facts which in their
295 judgment merited consideration at any time before the making of the final award.

The arbitrators found it necessary to make extensive investigations and study on their own account in order to secure needed information. The Auditing Division of the Packers and Stockyards Administration made such audit of the books of all the market agencies at the four markets involved as the time at hand would permit and furnished information relative to the profits and losses for each firm for a period of time sufficient to indicate the state of the business.

The Auditing Division also secured and furnished information in regard to the character of the receipts of the different classes of livestock at each of the markets. The plan followed in collecting information of this character was to select representative months to show the number of head per car, drafts per car, buyers per car, gross sales weight per car, commission per car, and other expenses, and such other information as would be useful. Numerous conferences were held with officials of livestock exchanges, officials of livestock organizations, and other informed persons. A questionnaire was sent to each market agency which was designed to secure information bearing upon the volume of business handled during the year 1922, the number of employees engaged by each firm, the salary paid each, and such other information as would clearly disclose the nature of their organizations and their business operations.

In order to thoroughly familiarize themselves with local conditions prevailing at the several markets in question, the arbitrators made extensive personal investigations, spending considerable time in observing market transactions in the yards.

296 Various reports and letters bearing information and suggestions were received from individuals interested in commission rates. The information submitted by the interested parties, as well as information secured in other ways, has been carefully reviewed. All the documents, letters, and other papers submitted, including the record of the hearings, are on file with the Packers and Stockyard Administration.

In approaching their duties the arbitrators have been cognizant of the situation of the livestock producer and the economic conditions which have confronted him during the past three years. They have also recognized that the welfare of the livestock industry is of mutual interest to the producer, the consumer, and intermediate agencies, and that it is desirable, therefore, to maintain marketing costs on as low a basis as is consistent with efficient service.

It is a noteworthy fact that the manner in which livestock is shipped to market has materially changed during the past few years. Also the methods of purchasing livestock have undergone material change. Market agencies are confronted with the necessity of meeting the changing conditions without lowering the efficiency of their service. It has been the usual custom on the part of the producer or shipper to ship his animals in carload lots, with seldom more than one owner, but with the development of cooperative shipping a very large percentage of the shipments of livestock at the four markets under consideration is owned by two or more persons, frequently the owner numbering as high as fifteen and twenty to the car. The

297 method of shipping necessitates a marked departure from the usual method of selling and accounting for livestock to the producers and shippers.

In the purchase of livestock in the market the buyers representing the larger packers are usually in close touch with their chief buyers.

who is generally located in Chicago. He keeps in close touch with the buyers of his concern in the various markets and apparently directs in considerable detail the purchases of the various representatives on the several markets. It appears that the larger purchasing concerns have adopted the policy of employing representatives who specialize in the purchase of market grades and classes. The average buyer to-day representing a packer, either at the market place or elsewhere, is usually looking for animals to fill a definite place in the course of business of that concern. In order to determine properly market value, broadly speaking, the buying conditions found at the several markets require that market agencies be informed as to the receipts of livestock at the various important markets, the prospective supply of livestock, the condition of the fresh and cured meat trade, the volume of various packing house products going into consumptive channels, the needs of the local packing plants, demand of buyers from other centers, and be in possession of information concerning the many other factors that enter into the establishing of the trading basis of a given market from time to time. A selling agency at a market center, in addition to being posted on general trade conditions, must be a judge of both the quality of the various classes of livestock and their market value at the time of sale.

298 It is conceded by all parties that the improper loading at the time of shipment and improper handling of animals in transit, neglect in properly caring for and feeding the animals upon arrival at the market, lack of information or selling ability on the part of the market agencies, neglect in safeguarding other interests of the shipper, may reflect themselves materially in the net return to the shipper or producer.

In reaching a conclusion as to what, in their judgment, will be a fair charge for the producer to pay and a fair compensation to the market agencies for the services rendered, the arbitrators have in mind that it is not within their province to pass on the question of whether a firm has a right to act as a market agency, but they have approached it from the standpoint that the compensation should be reasonably remunerative to those efficiently functioning as market agencies. It would not be to the advantage of the livestock producer to bring about arbitrarily such conditions as to cause necessary talent to seek a field for its services other than with a livestock market agency. It appears that the producer and the shipper should be the best judges as to the quality of service furnished them by the several market agencies and as to whether the service is satisfactory. It is entirely within the power of the patrons of the market to withhold patronage from those market agencies that fail to give satisfactory service. Herein lies an effective means, available to the shipper, of improving market services.

At the four markets involved the shipper may avail himself of the services of the "old line" commission firms or cooperative commission agencies. In addition, if the shipper or producer desires to

offer his livestock for sale in person, the facilities of the market center for receiving, caring for, and making delivery of his livestock are available to him. This condition offers the producer a choice of methods of selling his livestock and the compensation that he shall pay therefor. The Bureau of Agricultural Economics is constantly represented at the market centers and prepares and disseminates, from day to day, carefully analyzed reports of the market conditions on classes and grades of all species of livestock. A similar service is performed by daily market papers and other marketing organizations. From these agencies producers and shippers can inform themselves as to the market conditions under which livestock is being handled.

In approaching the determination of the reasonableness of commission rates for handling livestock at the stockyards, it is apparent, both from information and observation, that while the judicious employment of limited capital is necessary, yet capital as such is not a material income-producing factor. The commission business is essentially personal in the character of the service performed. The relation between the market agency and its customers is primarily a personal one. The useful market agency must always be alert in observing and sensing those factors which enter into the making of market prices from day to day and hour to hour. Constant attention to the maintenance of the highest kind of personal service in behalf of shippers must be exercised at all times. The sound business judgment and integrity of the market agency is of prime importance to the producer and shipper. The selling of the producer's livestock to persons with the ability to pay, collecting, safeguarding, and remitting the proceeds to the shipper, are important factors that enter into an adequate service. With these facts in mind, the arbitrators believe the livestock industry will be benefited by the maintenance of the highest quality of service at the market centers.

The arbitrators have considered the commission business strictly on its merits and apart from other activities engaged in by commission firms. In taking this view, it is not their thought that those associated enterprises are not proper activities for those engaged in the commission business, or that they are not beneficial to very many producers, but it is their conclusion that the matter of rate should be considered strictly from the viewpoint of the commission business as such. Very many services beneficial to the producer are, and even to an enlarged degree can be, performed by the market agencies in addition to the strict duties of selling and accounting for livestock.

In respect to market and financial risks to which market agencies are exposed, insurance against many of these losses has been devised and is offered to market agencies at a comparatively nominal fee. The market agency bears many risks against which there is no insurance or protection, and at the same time is financially responsible to

the shipper. Moreover, it is apparent that market agencies must meet the general economic conditions that prevail in respect to wages, cost of equipment, and such other elements as are essential in the conduct of their business.

It is the opinion of the arbitrators that market agencies which conduct a reasonably efficient business should not be arbitrarily denied a reasonable margin of profit for the capital, responsibilities, and risks involved. The conclusions reached are based upon
 301 what appears to be the basis upon which a well organized commission firm with a reasonable volume of business can operate efficiently, maintaining a high character of service and giving opportunity for reasonable profit.

Many suggestions have been received proposing changes in the methods of assessing and collecting commission charges, but the present form in which shipments are received at the markets renders it inadvisable to make any radical departures. In the present schedules of commission charges there are features which the arbitrators deem advisable to change, believing that their present operation is not entirely equitable. No departure has been made except after full and careful deliberation. The arbitrators are aware that should any of the proposed changes prove to be impracticable, relief may be had upon a proper showing to the Secretary.

The arbitrators are cognizant of the fact that it is difficult to arrive at an exact figure where so many complex services are required. However, after considering all the factors and problems involved, the arbitrators conclude that the schedule of rates and charges hereinafter set forth for the markets under consideration will reasonably compensate market agencies engaged in the sale of livestock, on a commission basis for the services performed and the producer and shipper of livestock will not pay more than a reasonable charge for the services required. It is therefore recommended for the approval of the Secretary that the schedules of rates and charges now in effect at the markets concerned be amended to comply with the following provisions and put into full force and effect as promptly as circumstances will permit.

302 CHICAGO SELLING COMMISSIONS—SINGLE OWNERSHIP—CARLOAD LOTS

Cattle

20 head or less, \$17.00—and 75c per head for each additional head over 20 head, with a maximum of \$21.00.

When car contains less than 14 head, the "drive-in" schedule applies.

Calves—Single-deck

50 head or less, \$17.00—and 30c per head for each additional head over 50 head, with a maximum of \$22.00.

Double-deck

70 head or less, \$23.00—and 30¢ per head for each additional head over 70 head, with a maximum of \$28.00.

When car contains less than 40 head, the "drive-in" schedule applies.

Hogs—Single-deck

50 head or less, \$13.00—and 15¢ per head for each additional head over 50 head, with a maximum of \$15.00. An additional charge of 30¢ shall be made for each full 500 pounds weight over 17,000 pounds.

Double-deck

80 head or less, \$18.00—and 15¢ per head for each additional head over 80 head, with a maximum of \$23.00. An additional charge of 30¢ shall be made for each full 500 pounds weight over 27,000 pounds. When a car contains less than 40 head, the "drive-in" schedule applies.

Sheep—Single-deck, \$14.00

Double-deck, \$20.00

When a car contains less than 50 head, the "drive-in" schedule applies.

303

Mixed Livestock

	Per head	Single-deck maximum	Double-deck maximum
Cattle.....	85¢	\$21.00	
Calves.....	35¢	22.00	\$28.00
Hogs.....	25¢	15.00	23.00
Sheep.....	20¢	14.00	20.00

Minimum of \$16.00, and maximum of \$26.00, on single-deck car.

Minimum of \$21.00, and maximum of \$29.00, on double-deck car.

When a car contains cattle and calves only, the minimum shall be \$17.00 and the maximum \$24.00.

SELLING COMMISSION—PLURAL OWNERSHIP—CARLOAD LOTS

Plural Owner Car Lots—Sold as Single Ownership

When plural ownership carload lots of livestock are handled in the same manner as single ownership cars—that is, not weighed for ownership, marks, brands, or other identification and not prorated, but handled for market grades and classes only—the single ownership schedules shall apply.

Plural Owner Car Lots Handled for Ownership Marks, Brands, or Other Identification

When carloads of livestock require prorating, separate sorting, selling, or weighing for ownership, marks, brands, or other identification, or at request of shipper, the following rates shall apply.

304

Unmixed Cars

	Per head	Single-deck		Double-deck	
		Minimum	Maximum	Minimum	Maximum
Cattle.....	85¢	\$18.00	\$22.00		
Calves.....	35¢	18.00	23.00	\$24.00	\$29.00
Hogs.....	25¢	14.00	16.00	19.00	24.00
Sheep.....	20¢	14.00	16.00	20.00	22.00

Mixed Cars

	Per head	Single-deck maximum	Double-deck maximum
Cattle.....	85¢	\$22.00	
Calves.....	35¢	23.00	\$29.00
Hogs.....	25¢	16.00	24.00
Sheep.....	20¢	16.00	22.00

Minimum of \$17.00, and maximum of \$26.00, on single-deck car.

Minimum of \$22.00, and maximum of \$29.00, on double-deck car.

When a car contains cattle and calves only, the minimum shall be \$18.00 and the maximum \$24.00.

Under this schedule no owner shall pay more than the maximum commission and extra service charges, if any, on single ownership carloads.

Stock driven or hauled in

The rates of the present Chicago "drive-in" schedule will apply.

305

EXTRA SERVICES

Drafts

1. Single Ownership.—When requested or necessary to grade or sort car lots of livestock of single ownership into market grades and classes a charge of 15¢ shall be made for each draft over three drafts per deck—each draft to be represented by a separate scale ticket. Maximum charge, \$2.00.

2. Plural Ownership.—When requested or necessary to grade or sort car lots of livestock of plural ownership for ownership, market grades and classes, brands, marks, or other identification, a charge of 15¢ per draft shall be made for each draft over three per deck—each draft to be represented by a separate scale ticket. Maximum charge, \$3.00.

Prorating

When prorating is done a charge of 25¢ for each owner shall be made, with a minimum charge of \$1.00 and a maximum charge of \$2.50 for this service.

Individual account sales

When individual statements are requested in addition to the master prorate sheet a charge of 5¢ extra shall be made for each statement.

306 KANSAS CITY—SELLING COMMISSIONS—SINGLE OWNERSHIP—
CARLOAD LOTS

Cattle

20 head or less, \$15.00—and 65¢ per head for each additional head over 20 head, with a maximum of \$19.00.

When car contains less than 14 head the "drive-in" schedule applies.

Calves—Single-deck

50 head or less, \$15.00—and 30¢ per head for each additional head over 50 head, with a maximum of \$20.00.

Double-deck

70 head or less, \$21.00—and 30¢ per head for each additional head over 70 head, with a maximum of \$26.00.

When car contains less than 40 head the "drive-in" schedule applies.

Hogs—Single-deck

50 head or less, \$12.00—and 15¢ per head for each additional head over 50 head, with a maximum of \$14.00. An additional charge of 30¢ shall be made for each full 500 pounds weight over 17,000 pounds.

Double-deck

80 head or less, \$17.00—and 15¢ per head for each additional head over 80 head, with a maximum of \$22.00.

An additional charge of 30¢ shall be made for each full 500 pounds weight over 27,000 pounds.

When a car contains less than 40 head the "drive-in" schedule applies.

307

Sheep—Single-deck \$14.00

Double-deck \$20.00

When a car contains less than 50 head, the "drive-in" schedule applies.

Mixed Livestock

	Per head	Single-deck maximum	Double-deck maximum
Cattle.....	75c	\$19.00	
Calves.....	35c	20.00	\$26.00
Hogs.....	25c	14.00	22.00
Sheep.....	20c	14.00	20.00

Minimum of \$15.00 and maximum of \$25.00, on single-deck car.

Minimum of \$20.00 and maximum of \$28.00, on double-deck car:

When a car contains cattle and calves only, the minimum shall be \$15.00 and the maximum \$22.00.

SELLING COMMISSION—PLURAL OWNERSHIP—CARLOAD LOTS

Plural Owner Car Lots—Sold as Single Ownership

When plural ownership carload lots of livestock are handled in the same manner as single ownership cars—that is, not weighed for ownership, marks, brands, or other identification, and not prorated, but handled for market grades and classes only—the single ownership schedules shall apply.

Plural Owner Car Lots Handled for Ownership, Marks, Brands, or Other Identification

When carloads of livestock require prorating, separate sorting, selling, or weighing for ownership, marks, brands, or other identification, or at request of shipper, the following rates shall apply:

308

Unmixed Cars

	Per head	Single-deck		Double-deck	
		Minimum	Maximum	Minimum	Maximum
Cattle.....	75c	\$16.00	\$20.00		
Calves.....	35c	16.00	21.00	\$22.00	\$27.00
Hogs.....	25c	13.00	15.00	18.00	23.00
Sheep.....	20c	14.00	16.00	20.00	22.00

Mixed Cars

	Per head	Single-deck maximum	Double-deck maximum
Cattle.....	75c	\$20.00	
Calves.....	35c	22.00	\$27.00
Hogs.....	25c	15.00	23.00
Sheep.....	20c	16.00	22.00

Minimum of \$16.00 and maximum of \$25.00, on single-deck

Minimum of \$21.00 and maximum of \$28.00, on double-deck

When a car contains cattle and calves only, the minimum shall be \$16.00 and the maximum \$22.00.

Under this schedule no owner shall pay more than the maximum commission and extra service charges, if any, on single owner carloads.

Stock Driven or Hauled In

The rates of the present Kansas City "drive-in" schedule apply.

309

EXTRA SERVICES

Drafts

1. Single Ownership.—When requested or necessary to grade sort car lots of livestock of single ownership into market grades and classes, a charge of 15¢ shall be made for each draft over three per deck—each draft to be represented by a separate scale ticket. Maximum charge, \$2.00.

2. Plural Ownership.—When requested or necessary to grade sort car lots of livestock of plural ownership for ownership, market grades and classes, brands, marks, or other identification, a charge of 15¢ per draft shall be made for each draft over three per deck—each draft to be represented by a separate scale ticket. Maximum charge, \$3.00.

Prorating

When prorating is done a charge of 25¢ for each owner shall be made, with a minimum charge of \$1.00 and a maximum charge of \$2.50 for this service.

Individual Account Sales

When individual statements are requested in addition to the market prorated sheet, a charge of 5¢ extra shall be made for each statement.

310 OMAHA—SELLING COMMISSIONS—SINGLE OWNERSHIP—CARLOADS

Cattle

20 head or less, \$15.00—and 70¢ per head for each additional head over 20 head, with a maximum of \$19.00.

When car contains less than 14 head, the "drive-in" schedule applies.

Calves—Single-deck

50 head or less, \$15.00—and 30¢ per head for each additional head over 50 head, with a maximum of \$20.00.

Double-deck

70 head or less, \$21.00—and 30¢ per head for each additional head over 70 head, with a maximum of \$26.00.

When car contains less than 40 head, the "drive-in" schedule applies.

Hogs—Single-deck

50 head or less, \$12.00—and 15¢ per head for each additional head over 50 head, with a maximum of \$14.00. An additional charge of 30¢ shall be made for each full 500 pounds weight over 17,000 pounds.

Double-deck

80 head or less, \$17.00—and 15¢ per head for each additional head over 80 head, with a maximum of \$22.00. An additional charge of 30¢ shall be made for each full 500 pounds weight over 27,000 pounds.

When a car contains less than 40 head, the "drive-in" schedule applies.

311 Sheep—Single-deck \$14.00

Double-deck \$20.00

When a car contains less than 40 head, the "drive-in" schedule applies.

Mixed Livestock

	Per head	Single-deck maximum	Double-deck maximum
Cattle.....	75¢	\$19.00	
Calves.....	35¢	20.00	\$26.00
Hogs.....	25¢	14.00	22.00
Sheep.....	20¢	14.00	20.00

Minimum of \$15.00, and maximum of \$25.00, on single-deck car.

Minimum of \$20.00, and maximum of \$28.00, on double-deck car.

When a car contains cattle and calves only, the minimum shall be \$15.00, and the maximum \$22.00.

SELLING COMMISSION—PLURAL OWNERSHIP—CARLOAD LOTS

Plural Owner Car Lots—Sold as Single Ownership

When plural ownership carload lots of livestock are handled in the same manner as single ownership cars—that is, not weighed for ownership, marks, brands, or other identification and not prorated, but handled for market grades and classes only—the single ownership schedules shall apply.

Plural Owner Car Lots Handled for Ownership, Marks, Brands, or Other Identification

When carloads of livestock require prorating, separate sorting, selling, or weighing for ownership, marks, brands, or other identification, or at request of shippers, the following rates shall apply.

312

Unmixed Cars

	Per head	Single-deck		Double-deck	
		Minimum	Maximum	Minimum	Maximum
Cattle.....	75¢	\$16.00	\$20.00		
Calves.....	35¢	16.00	21.00	\$22.00	\$27.00
Hogs.....	25¢	13.00	15.00	18.00	23.00
Sheep.....	20¢	14.00	16.00	20.00	22.00

Mixed Cars

	Per head	Single-deck maximum	Double-deck maximum
Cattle.....	75¢	\$20.00	
Calves.....	35¢	21.00	\$27.00
Hogs.....	25¢	15.00	23.00
Sheep.....	20¢	16.00	22.00

Minimum of \$16.00 and maximum of \$25.00, on single-deck car.

Minimum of \$21.00, and maximum of \$28.00, on double-deck car.

When a car contains cattle and calves only, the minimum shall be \$16.00 and the maximum \$22.00.

Under this schedule no owner shall pay more than the maximum commission and extra service charges, if any, on single ownership carloads.

Stock Driven or Hauled In

The rates of the present Omaha "drive-in" schedule shall apply.

313

EXTRA SERVICES

Drafts

1. Single Ownership.—When requested or necessary to grade or sort car lots of livestock of single ownership into market grades and classes, a charge of 15¢ shall be made for each draft over three drafts per deck—each draft to be represented by a separate scale ticket. Maximum charge, \$2.00.

2. Plural Ownership.—When requested or necessary to grade or sort car lots of livestock of plural ownership into market grades and classes, a charge of 15¢ shall be made for each draft over three drafts per deck—each draft to be represented by a separate scale ticket. Maximum charge, \$2.00.

grades and classes, brands, marks, or other identification, a charge of 15¢ per draft shall be made for each draft over three per deck—each draft to be represented by a separate scale ticket. Maximum charge, \$3.00.

Prorating

When prorating is done a charge of 25¢ for each owner shall be made with a minimum charge of \$1.00 and a maximum charge of \$2.50 for this service.

Individual account sales

When individual statements are requested in addition to the master prorate sheet, a charge of 5¢ extra shall be made for each statement.

ST. PAUL—SELLING COMMISSIONS—SINGLE OWNERSHIP—CARLOAD LOTS

Cattle

20 head or less, \$15.00—and 65¢ per head for each additional head over 20 head, with a maximum of \$19.00.

When car contains less than 14 head, the “drive-in” schedule applies.

Calves—Single-deck

50 head or less, \$15.00—and 30¢ per head for each additional head over 50 head, with a maximum of \$20.00.

Double-deck

70 head or less, \$21.00—and 30¢ per head for each additional head over 70 head, with a maximum of \$26.00.

When car contains less than 40 head, the “drive-in” schedule applies.

Hogs—Single-deck

50 head or less, \$12.00—and 15¢ per head for each additional head over 50 head, with a maximum of \$14.00. An additional charge of 0¢ will be made for each full 500 pound weight over 17,000 pounds.

Double-deck

80 head or less, \$17.00—and 15¢ per head for each additional head over 80 head, with a maximum of \$22.00. An additional charge of 0¢ will be made for each full 500 pounds weight over 27,000 pounds.

When car contains less than 40 head, the “drive-in” schedule applies.

Sheep—Single-deck \$14.00

Double-deck \$20.00

When a car contains less than 50 head, the "drive-in" schedule applies.

Mixed livestock

	Per head	Single-deck maximum	Double-deck maximum
Cattle.....	75¢	\$19.00	
Calves.....	35¢	20.00	
Hogs.....	25¢	14.00	
Sheep.....	20¢	14.00	

Minimum of \$15.00, and maximum of \$25.00, on single-deck cars.

Minimum of \$20.00; and maximum of \$28.00, on double-deck cars.

When a car contains cattle and calves only, the minimum shall be \$15.00 and the maximum \$22.00.

SELLING COMMISSION—PLURAL OWNERSHIP—CARLOAD LOTS

Plural owner car lots—Sold as single ownership

When plural ownership carload lots of livestock are handled in the same manner as single ownership cars—that is, not weighed for ownership, marks, brands, or other identification and not prorated, but handled for market grades and classes only—the single ownership schedules shall apply.

Plural owner car lots handled for ownership, marks, brands, or other identification

When carloads of livestock require prorating, separate sorting, weighing, or weighing for ownership, marks, brands, or other identification, or at request of shipper, the following rates shall apply:

Unmixed Cars

	Per head	Single-deck		Double-deck	
		Minimum	Maximum	Minimum	Maximum
Cattle.....	75¢	\$16.00	\$20.00		
Calves.....	35¢	16.00	21.00	\$22.00	
Hogs.....	25¢	13.00	15.00	18.00	
Sheep.....	20¢	14.00	16.00	20.00	

Mixed Cars

	Per head	Single-deck maximum	Double-deck maximum
Cattle.....	75¢	\$20.00	
Calves.....	35¢	21.00	
Hogs.....	25¢	15.00	
Sheep.....	20¢	16.00	

Minimum of \$16.00 and maximum of \$25.00, on single-deck car.

Minimum of \$21.00 and maximum of \$28.00, on double-deck car.

When a car contains cattle and calves only the minimum shall be \$16.00 and the maximum \$22.00.

Under this schedule no owner shall pay more than the maximum commission and extra service charges, if any, on single ownership carloads.

Stock Driven or Hauled In

For St. Paul, the "drive-in" schedule shall be: cattle, 80¢ per head; calves, 40¢ per head; hogs, 30¢ per head; and sheep and goats, 20¢ per head.

EXTRA SERVICES

Drafts

1. Single Ownership.—When requested or necessary to grade or sort car lots of livestock of single ownership into market grades and classes, a charge of 15¢ shall be made for each draft over three drafts per deck—each draft to be represented by a separate scale ticket. Maximum charge, \$2.00.

2. Plural Ownership.—When requested or necessary to grade or sort car lots of livestock of plural ownership for ownership, market grades and classes, brands, marks, or other identification, a charge of 15¢ per draft shall be made for each draft over three per deck—each draft to be represented by a separate scale ticket. Maximum charge, \$3.00.

Prorating

When prorating is done a charge of 25¢ for each owner shall be made, with a minimum charge of \$1.00 and a maximum charge of \$2.50 for this service.

Individual Account Sales

When individual statements are requested in addition to the master prorate sheet, a charge of 5¢ extra shall be made for each statement.

318 If circumstances arise under which more than one interpretation of the schedules might be applied, that interpretation which is most favorable to the shipper shall be used.

The revised schedules contemplate a basic charge for those shipments requiring a uniform service and additional charges for those shipments requiring services in addition to the usual standard service. The draft charge is designed to operate when more than the ordinary amount of sorting, grading, and weighing for ownership and market grades and classes is necessary. The prorating charge is to compensate for a complete accounting of each owner's livestock in a plural ownership shipment. If, in addition, a separate statement for each owner is rendered, then an additional charge is provided for this

service. The amount that can be collected for these special services has been carefully limited and the charges can be assessed only to the extent that the services are utilized. This makes it possible for all shippers to get the benefit of the basic charge when the character of their shipments does not require this extra service. The shippers are thus relieved from paying for services not necessary to the proper marketing of their shipments.

It is the recommendation of the arbitrators that the schedules revised in accordance with the above provisions should be observed by all market agencies engaged in business at each of the markets involved and that no departure from the established schedule should be made except after an actual demonstration by a market agency that it can successfully and efficiently operate under a different schedule than the one herein proposed. A showing for such departure should be based on the facts concerning the operations of the concern which seeks to change its schedule.

319 The arbitrators are duly appreciative of the confidence reposed in them, and if substantial justice results from their efforts they will be gratified at this opportunity to have served the industry.

In carrying out their duties the arbitrators have found it necessary to avail themselves of the assistance of many of those engaged in the various phases of producing and marketing livestock. This assistance has been freely and cordially given by the market agencies and their staffs, the producers and their representatives, the staff of the Packers and Stockyards Administration, and by many others engaged in the industry. For the cooperation and assistance given, the arbitrators desire to express their appreciation and to accord a full measure of credit.

(Signed) G. N. DAGGER.

(Signed) HOWARD M. GORE.

Date of Award July 24th, 1923.

Approved by Authority of Secretary Henry C. Wallace.

(Signed) C. W. PUGSLEY,

Acting Secretary.

United States Department of Agriculture.

JULY 27, 1923.

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In United States District Court

Before VAN VALKENBURGH, Circuit Judge, and REEVES and OTIS,
District Judges

Opinion of the court

Filed October 29, 1934

OTIS, District Judge, delivered the opinion of the Court:

These are fifty-nine cases in equity contemporaneously initiated in this Court, submitted together and now for decision after final hear-

ing. The prayer of the petition in each case is for injunctive relief against the enforcement of a certain order of the Secretary of Agriculture, dated June 14, 1933, fixing maximum rates and charges for stockyard services rendered by the petitioners at the Kansas City Stockyards in Kansas City, Missouri.

The business of each of the petitioners is that of a livestock selling and buying (or marketing) agency. It is a business affected with a public interest whose rates and charges for services rendered by it to its patrons are subject to governmental regulation. Since the business of each of the petitioners directly affects commerce among the several states Congress is authorized by the Constitution to legislate touching such rates and charges. Congress has done that in the so-called Packers and Stockyards Act (42 Stat. L. 163), providing in that Act that such rates and charges shall be such only as are reasonable and delegating to the Secretary of Agriculture the function and power of determining what rates and charges are reasonable. The validity of this legislation has been determined by the Supreme Court (*Tagg Bros. v. United States*, 280 U. S. 420) and is not questioned in these cases.

The Packers and Stockyards Act provides that—

SEC. 310. Whenever after full hearing upon a complaint made as provided in Section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

321 (a) May determine and prescribe what will be just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, to be charged and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

Pursuant to the provisions of the Act the Secretary of Agriculture on his own initiative on April 7, 1930, ordered an inquiry into the reasonableness of the rates and charges of the petitioners for stockyard services rendered by them. A hearing followed before an examiner designated for that purpose. Testimony was taken by him which fills 6721 typewritten pages in addition to which 159 exhibits were offered in evidence. Followed an oral argument before an

"Acting Secretary of Agriculture." Thereafter, on May 18, 1932, the Secretary of Agriculture issued an order fixing the maximum rates and charges. A petition for rehearing was granted July 15, 1932. At the rehearing conducted by an examiner testimony was taken which fills 3091 typewritten pages in addition to which 11 exhibits were offered in evidence. Followed a second oral argument before an "Acting Secretary of Agriculture." Thereafter, on June 14, 1933, the Secretary of Agriculture made and issued findings of facts and the order based thereon fixing rates and charges which is now attacked. A petition for a rehearing as to this order was denied.

The rates and charges of petitioners which were in effect on June 13, 1933, and which the Secretary held were unreasonable were in the form of a fixed charge per head of livestock bought or sold; the charge varying with the kind of livestock and with the number of animals involved in any transaction. Thus, for selling calves the charge was thirty cents per head for a consignment of from 322 1 to 20 head and twenty-five cents per head for all over 20 head. The maximum charges ordered by the Secretary were in the same form. For illustration, the Secretary's order required that the maximum selling charge as to calves should be: thirty-five cents per head in a consignment of one head, twenty cents a head in a consignment of from 1 to 40 head, five cents per head for all over 40 head.

We preface with this brief preliminary statement our consideration of the issues.

In so far as the subject yet has been developed in judicial opinions there are possible only five attacks on such an order as that with which we are here concerned, and the petitioners have made all of them save one. They are: (1) That the statutory procedure was not followed; (2) that the findings do not support the order; (3) that the findings are not supported by the evidence; (4) that erroneous rules of law were followed to reach the findings; (5) that the rates and charges fixed in the order are confiscatory and so violative of constitutional rights. *Tagg Bros. v. United States*, supra; *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U. S. 452, 454.

The Procedure

1. Before the Secretary lawfully can make an order of this character he must accord a "full hearing to the interested parties." See 310 of the Act. In the petitions it was alleged that a full hearing was denied in that: (1) each and every of the petitioners was denied a separate hearing; (2) that the Secretary of Agriculture in person did not hear arguments on the evidence, but without authority in law delegated that duty to assistant secretaries designated as Acting Secretaries; and (3) that the Secretary signed the order without reading the evidence. On a preliminary hearing we sustained a motion to strike these allegations from the petitions. We think it is unnecessary now to elaborate the obvious observation that the

theory of these allegations is supported by nothing in the Act and that a construction of the Act consistent with that theory would destroy it altogether as a measure capable of practical administration.

Findings Support Order

2. The Secretary made 162 findings of fact upon the evidence heard at the original hearing and at the rehearing. No contention is made but that these findings support the order. Unquestionably they do support the order, and that fully.

Findings Supported by Evidence

3. The business of a livestock agency is of a personal service character requiring little invested capital. To arrive at what are reasonable rates and charges for the services rendered by such an agency at a given place, as at the Kansas City stockyards in Kansas City, Missouri, the following factors must be considered: (1) the total volume of business to be transacted; (2) the number of men required for the efficient handling of that business; (3) the reasonable cost of handling the business, including reasonable compensation of the men necessarily employed and other necessary and proper costs; (4) the capital investment required for the efficient handling of the volume of business reasonably to be expected; (5) what is a proper return on the capital so invested; (6) what is a reasonable compensation for management and a reasonable profit. The findings made by the Secretary included all of these factors and every other conceivable factor necessary to be considered. Some of the findings are challenged as contrary to the evidence.

Save possibly where the issue of confiscation is for determination the settled rule is that the findings of the Secretary in a proceeding of this character "must be accepted by the court as conclusive if the evidence before him was legally sufficient to maintain them." *Tagg Bros. v. United States et al.*, 280 U. S. 420, 444. The court is not concerned with the weight of the evidence, with whether its judgment concurs with that of the Secretary, but only with the question: is any finding essential to the order under review unsupported by any substantial evidence?

With this rule in mind we have gone to the record, with the aid of briefs submitted, and have found therein substantial testimony to support every challenged finding, nor do we find any justification for the contention of petitioners that in arriving at his findings material and relevant evidence was ignored. The important and essential findings, such as, for example, how many hogs an efficient salesman should sell in a given time, what are reasonably compensatory salaries salesmen should receive, what costs are legitimate, and what unnecessary, what wastes may be eliminated, indeed almost every finding that was made except those which were merely statistical, clearly depend upon the application to the testimony of the judgment of him charged with the duty of making findings.

That duty the law imposes on the Secretary. We cannot overturn his judgment as to such matters when there is evidence to support his findings.

Claimed Errors of Law

It is true that such an order as the one here attacked must be set aside if it rests upon an erroneous rule of law. *Tagg Bros. v. United States*, 280 U. S. 420, 442. The petitioners assert the applicability of this principle to these cases, but just what erroneous rules of law the petitioners claim were applied by the Secretary we have had some difficulty in gathering from the petitions and briefs notwithstanding the great labor able counsel for petitioners obviously have given to their preparation.

There is no contention that the subject matter sought to be regulated was not within the Secretary's jurisdiction under the statute and no allegation, therefore, of any such fundamental legal error as a misinterpretation of the statute would have been. The contentions, as best we can state them (they purport to be set out in Subdivision VII of each of the petitions), are the following:

A. The costs used by the Secretary were arrived at arbitrarily and in disregard of the facts. Clearly this is not a matter of applying an erroneous rule of law, but a matter of whether the evidence supports the findings.

B. The Secretary ruled rightly that the reasonable rates to be fixed should include a profit but erroneously that compensation allowed for management and the carrying of uninsurable risks included the element of profit whereas the cost of management and of carrying uninsurable risks are legitimate expenses and the petitioners are entitled to something additional as profits. The answer to the contention is that if it be conceded that it was error to rule that the allowance for management and the cost of carrying uninsurable risks necessarily included all the profit to which an owner is entitled in truth the rates fixed had an additional spread, above all costs, including the two specified, which spread allows and provides for the alleged omission.

325 C. The Secretary rightly ruled that the petitioners were entitled to a return on capital investment, but erroneously excluded any allowances for going concern values. Such is the contention. The evidence whereon the contention is based is to the effect that the methods and practices used by the petitioners were worth (not that they had cost) \$66,401. The contention is that a return should be allowed on that amount. The view of the Secretary was that while knowledge of these methods and practices was indispensable anyone is free to use them and they are not property. Such knowledge is a part of the necessary mental equipment of those rendering livestock selling and buying service. Compensation for the service includes full return for the use of the knowledge of methods and practices. It is not an element of capital investment. We agree.

D. The Secretary erroneously excluded from consideration of costs various legitimate classes of expenses, such as insurance against normal risks. We find in the record no support for this contention.

E. Various other contentions are made in this connection which we think present no errors of law.

Confiscation

Each of the petitioners claims that the order of the Secretary violates the due process clause of the Fifth Amendment in that it deprives him of his property without due process of law. Whether the presence in these cases of this issue of confiscation entitles the petitioners to the independent judgment of the court as to the law and the facts after a consideration of all of the testimony heard by the Secretary and also additional testimony offered before this Court, never has finally been decided by the Supreme Court. *Tagg Bros. v. United States*, 280 U. S. 420, 443. The view that those alleging confiscation are entitled to the independent judgment of the court is supported by such cases as *Ohio Valley Water Works Company v. Ben Avon Borough*, 253 U. S. 287, 289; *Bluefield Water Works Company v. Public Service Commission*, 262 U. S. 679, 689; *Prendergast v. New York Tel. Co.*, 262 U. S. 43, 50; *Lehigh Valley R. Co. v. Board of Public Utility Co.*, 278 U. S. 24, 26; *United Railways & Electric Co. v. West*, 289 U. S. 234, 251; *Phillips v. Commissioner*, 283 U. S. 589, 600. The view that even where the issue of confiscation is present, findings of fact made by the Secretary, if supported by substantial evidence, are conclusive, is supported by a consideration of the text of the Interstate Commerce Act to which the Packers and Stockyards Act refers and by *United States v. Louisville and N. E. Co.*, 235 U. S. 314, 320; *Interstate Commerce Commission v. Union Pac. R. Co.*, 222 U. S. 541, 547, and the dissenting opinion in *Ohio Valley Water Works Co. v. Ben Avon Borough*, 253 U. S. 287, 297, as well as by the declination of the Supreme Court to pass upon the matter in *Tagg Bros. v. United States*, 280 U. S. 420, 443. Whichever of these views is the correct one, it is certain that there is a strong presumption in favor of the findings made by the Secretary as well as those of any rate making body. *Darnell v. Edwards*, 244 U. S. 564.

If we proceed on the view that the findings of the Secretary are conclusive, if supported by any evidence, and we have determined that each of them is supported by substantial evidence, then the contentions of petitioners as to confiscation must be resolved against them with the exception of one of those contentions. All of the contentions, excepting one, are based upon the theory that the Secretary's findings as to costs are contrary to the weight of the evidence and that if correct findings were made the costs allowed in fixing rates and charges would be so much greater than those which were allowed as that it would conclusively appear that the rates and charges fixed in the Secretary's order did not adequately provide for

costs and so are confiscatory. If, however, having decided that the findings of the Secretary are sustained by substantial evidence, we are bound by his findings, then we are bound also to conclude that the Secretary's order makes full allowance for all reasonable costs in the rates and charges fixed by the order. The one contention as to confiscation not thus disposed of is that the rate of return allowed by the Secretary's order on invested capital of petitioners, which is 6% on fixed capital and 7% on working capital, as a matter of law is confiscatory. We regard that contention as without merit.

If we adopt the view that, having raised the issue of confiscation, the petitioners are entitled to the independent judgment of this court based upon all of the evidence which was before the Secretary, as well as the additional evidence offered at the trial of these 327 cases. Only presuming that the findings of the Secretary are correct, the same conclusion touching this issue is reached by us. Such an examination of all of the testimony as reasonably can be made, in view of its immense volume, we have made, reaching the conclusion that the essential findings made by the Secretary not only are sustained by substantial evidence but are in accordance with the weight of the evidence. Since those findings are right as to costs and since the rates and charges fixed by the Secretary's order adequately provide for costs and for a return on invested capital and for profits as to all petitioners who have shown that their agencies are efficiently conducted, the issue of confiscation must be resolved against the petitioners.

Other Matters

Contentions of the petitioners which have not been referred to specifically in this opinion have received the consideration of the Court and are resolved against the petitioners.

Findings of Fact

In each of these cases we make findings of fact as follows:

1. The order of the Secretary of Agriculture, dated June 14, 1933, fixing maximum rates and charges for petitioners as livestock selling and buying (marketing) agencies in the Kansas City Stockyards, Kansas City, Missouri, was made after full hearings accorded the petitioners, and each of them, and upon findings of fact made by the Secretary based upon the evidence taken at the hearings.

2. The findings of fact made by the Secretary of Agriculture upon which the order of June 14, 1933, was based are supported by substantial evidence.

3. Upon an independent consideration of the evidence, including the additional evidence taken by the court at the trial of these cases the Court adopts as its findings of fact the findings of fact made by the Secretary and by reference incorporates them herein.

Conclusions of Law

The Court concludes as matters of Law:

1. That the order of the Secretary of Agriculture, dated June 14, 1933, fixing maximum rates and charges for livestock buying and selling (marketing) agencies at the Kansas City Stockyards in Kansas City, Missouri, was made by the Secretary after a full hearing in all respects conforming with the requirements of the Packers and Stockyards Act.

2. That the order is fully supported by the findings of fact made by the Secretary and that those findings were based upon substantial evidence and are supported by the weight of the evidence and are not based upon any erroneous rules of law.

3. That the maximum rates fixed by the Secretary in the order are reasonable and that they do not take the property of petitioners, or any of them, without due process of law in violation of the terms and provisions of the Fifth Amendment to the Constitution of the United States.

Indicated Decree

Counsel for the defendants will prepare and submit to the Court for approval and entry in each of these cases a decree dismissing the plaintiff's bill and assessing the costs against the plaintiff.

[File endorsement omitted.]

In United States District Court

Before VAN VALKENBURGH, Circuit Judge, and REEVES and OTIS, District Judges

Concurring opinion

Filed October 29, 1934

VAN VALKENBURGH, Circuit Judge, concurring:

I agree with the decision to dismiss the bills, but I feel impelled to add some additional views with respect to some features of the findings made by the Secretary of Agriculture in reaching the conclusions leading to his order.

The reason, or at least the main reason, for the difference between petitioners and Secretary, lies in the matter of cost allowances and reasonable return to owners of the business. As stated by counsel for the Secretary, the substantive questions are:

1. Are the Secretary's findings of reasonable costs plus reasonable profits supported by the evidence?
2. Will the prescribed rate schedule produce sufficient revenue to cover the reasonable costs plus reasonable profits as found by the Secretary?

I think we may regard the entire controversy as resolved by an answer to the first of these questions, because the second is practically

conceded, the insistence being that the Secretary's allowance of cost is unreasonable and, therefore, that the resulting profits are so unreasonable as to amount to confiscation.

To my mind, basing the allowance of salaries upon the potential ability of a salesman to sell a given number of carloads in a year is too restrictive. Such ability is not subject to bare mathematical measure. One even casually familiar with stockyard operations knows that an efficient salesman must be a man of sound judgment and experience. His duties in fostering the business of the producer in causing his product to be reared and brought to sale under favorable market conditions, are of great value and are not subject to mathematical percentage measurement. The stock does not come in such regular periods as to permit a fixed amount of sales, ratably distributed over the market year. When it does come it must be attended to by expert and experienced men to the best advantage of the grower. It is evident, therefore, that an organization must be kept sufficient to handle the business as it is presented. Such employees must be permanent for this purpose. Capable men cannot be picked up at will. They must have a steady job, and at a wage that will reasonably compensate for the experience they bring and the service they perform. In this period, when it is emphasized that labor must receive a fitting reward, it will not do to visit upon the stockyards agencies, which are recognized as necessary to the commerce, too great a burden because of depression in the stock business. In their zeal to aid the stock raiser, government agencies must not forget the men who are essential to the making of his market. This applies in a lesser degree perhaps to yardmen and others employed in the business. It is to be emphasized that, if a market agency is to do business at all, it must have and maintain an organization sufficient to handle its business when it comes. An examination of records and briefs indicates that in various ways the agencies have striven to keep costs down. Obviously it was to their interest 330 to do so in years lean at the best. Their judgment as to the necessities should not be lightly set aside nor under-estimated.

So with respect to getting and maintaining business. Certainly a considerable amount of advertising, circularizing, and personal contact is proper and necessary to keep this market prominently before the raisers and shippers of stock in this normal-trade territory. The market agencies have to compete with other stock markets, with co-operatives, a percentage of whose profits go back to their members with packers and railroad yards, and with direct buyers generally. The fact that there may incidentally result competition between the agencies themselves is no sufficient ground for reducing the costs of such activities to an extremely narrow compass. Also, if such agencies are to continue, the owners, as they are termed, must be allowed to receive a return commensurate with the contribution they make to the success of this market and the risks they assume.

I do not undertake to decide that the costs demanded by petitioners may not in some degree be excessive. Of course, even the most val-

able operators cannot expect to make as much out of a small volume of business as out of one much larger; but they must be prepared for any reasonable eventuality, and the return fixed must not be so low as to drive too many of these agencies out of business, to the great injury of this stock-market, and, necessarily, to the shippers of stock, who would most conveniently patronize it. What the future volume of business may be is, of course, speculative, and should not be a controlling rate-making factor. The evidence is that the volume is decreasing during the periods under test. It appears that the order of the Secretary would reduce the number of men employed in handling the 1931 market from 188 to about 79. There were only fifty-nine firms originally petitioning. Nine are said to have retired from business, and, from the evidence before us, a number of others will necessarily follow.

It is true that no reasonable rate can be expected to protect all who may elect to engage in this quasi-public business, without regard to prevailing conditions; but the protection of the market against lowering an irreducible minimum is as necessary to the public interests as it is to that of the stock shippers themselves.

My reaction to the presentation made is that I should have 331 made a more liberal allowance for costs and owner return—not necessarily as great as that demanded by petitioners, and, of course, with due regard to the number of owners accredited to each firm. Five owners in the same firm cannot each expect to receive the maximum accredited or appraised to one. But it is to be observed that the Secretary has given consideration to all the elements essential to the computation of a general rate of this nature. By the statute he is given almost dictatorial power in the establishment of such rates, provided he gives due consideration to all the elements involved, does not depart from any rule of law, and, provided further, the rates established are not clearly unreasonable and confiscatory.

Just what would be the result of applying those rates to future business upon a reasonable cost basis, or as found by the Secretary, cannot be known, because it has not yet been tried. We cannot bring to the complex conditions involved the same expert judgment as is employed by what the Supreme Court has described as "a tribunal appointed by law and informed by experience." And we are forbidden to question the soundness of the reasoning, or the wisdom of the conclusions reached, and to substitute our judgment for that of the findings and conclusions announced. I think the attack of petitioners is directed, in its last analysis, to the soundness of the conclusions reached, and I fear that we have no power to disturb them upon the showing made. Renewed application to Secretary or Court may bring relief if reasonable experience, based upon the conditions imposed by the Secretary's order, is found to justify it. In this view I concur in the decision to dismiss the bills.

[File endorsement omitted.]

In United States District Court

Opinion on petition for rehearing

Filed June 20, 1935

VAN VALKENBURGH, Circuit Judge:

In support of the petition for rehearing counsel for petitioner urged the following criticisms of the order of the Secretary of Agriculture:

1. The Secretary employed an unreasonable, arbitrary, and 332 illegal method in finding total unit costs through combining separate reasonable functional unit costs; in this manner eliminating all competitive costs for rate-making purposes, in disregard of actual experience, basing rates upon hypothetical considerations and assumed conditions, contrary to the provisions of the Packers and Stockyards Act, which requires the public livestock market to be maintained as a competitive market.

2. It is necessary to consider the individual market agencies rather than to standardize all under a common mathematical rate base irrespective of such conditions as are essential to a competitive public market.

3. This results in the establishment of a monopoly of the market and stifles competition in buying and selling upon the market, tends to weaken and ultimately to destroy the market by diverting business to other more favored markets and agencies, and the undue restriction of the agencies enabled to operate profitably.

4. The Secretary's order eliminates essential competitive costs.

5. With this elimination agencies cannot compete at a profit. This is shown by a comparison with the new costs as applied to actual business operations during the test period.

6. The Tagg case does not apply to the situation here.

In the Tagg case the court upheld an order of the Secretary in which he used typical experience as his guide for determining reasonable costs for rate-making purposes. Typical costs are presumably based on the actual experience of the members of the industry whose rates are under consideration. In this case the Secretary employed hypothetical costs based not upon present but upon assumed conditions which he expects may exist at some future time. In my separate opinion, when this case was first decided, I called attention to the unfortunate method employed in fixing the salaries of salesmen and other employees. I said:

"Basing the allowance of salaries upon the potential ability of a salesman to sell a given number of carloads in a year is too restrictive. Such ability is not subject to bare mathematical measure."

333 Further consideration upon this petition for rehearing convinces that in the instant proceeding the Secretary has departed from the method employed in the Tagg case in the particulars pointed out by petitioner, as stated above. Furthermore, I think the drastic reduction of advertising and other costs essential to getting

and maintaining business gives scant consideration to the reasonable necessities of the situation as disclosed by experience. I fear the effect of these methods employed may, as suggested by petitioners, tend to weaken and ultimately to destroy this market by diverting business to other more favored markets and agencies and may tend further to the undue restriction of agencies enabled to operate profitably, a result injurious not only to this market but equally to the shippers of stock who would most conveniently patronize it. I find myself in full agreement with Judge Wilkerson in the case of Acker vs. United States, recently decided in the District Court for the Northern District of Illinois. He says:

"I do not concur in the findings of This Court, which adopt in toto the findings of fact made by the Secretary of Agriculture. Some of them, particularly those relating to salesmanship costs and allowances for business getting and maintaining expenses, are, in my opinion, against the weight of evidence. However, I am not prepared to say that the findings were made without any evidence to support them. I join, therefore, in the entry of the decree dismissing the bill."

I am therefore constrained to vote to deny this petition for rehearing in the hope that a renewed application to the Secretary may bring relief if reasonable experience, based upon the conditions imposed by the Secretary's order, is found to justify it.

I fully concur in the foregoing Memorandum.

ALBERT L. REEVES,

United States District Judge.

[File endorsement omitted.]

334 In United States District Court for the Western District of Missouri, Western Division

In Equity. No. 2328 and Related Cases Nos. 2329-78

F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN SHEEP COMMISSION COMPANY, ET AL., PETITIONERS

vs.

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE, DEFENDANTS

Before VAN VALKENBURGH, Circuit Judge, and REEVES and OTIS, District Judges

Opinion

Filed July 2, 1937

OTIS, District Judge, delivered the opinion of the Court:

The principal question now presented in these cases (the cases involve the validity of an order made by the Secretary of Agri-

culture fixing the maximum rates to be charged by market agencies for buying and selling livestock at the Kansas City Stock Yards) is whether the Secretary, before he made the order which is attacked, gave the plaintiffs such a hearing as they were entitled to by law. That question is presented following a remand of the cases after an appeal. The cases, consolidated for trial, had been tried and were adjudged by this court (S. F. Supp. 766). The Supreme Court reversed our decree and remanded the cases for determination of the question "whether plaintiffs had a proper hearing." 298 U. S. 468. As an introduction to our discussion of the question we here incorporate the first and certain other paragraphs of the opinion of the Supreme Court.

"The proceeding" was instituted by an order of the Secretary of Agriculture in April, 1930, directing an inquiry into the reasonableness of existing rates. Testimony was taken and an order prescribing rates followed in May, 1932. An Application for rehearing, in view of changed economic conditions, was granted in July 1932. After the taking of voluminous testimony, which was concluded in November 1932, the order of the Secretary was made on June 14, 1933. Rehearing was refused July 6, 1933.

Plaintiffs then brought these suits attacking the order, so far as it prescribed maximum charges for selling livestock, as illegal and arbitrary and as depriving plaintiffs of their property without due process of law in violation of the Fifth Amendment of the Constitution. The district court of three judges entered decrees sustaining the order and dismissing the bills of complaint. Motions for rehearing were denied and, by stipulation, the separate decrees were set aside and a joint and final decree was entered to the same effect. Plaintiffs bring this direct appeal."

The Supreme Court then indicated in its opinion the question raised on the merits, after which the opinion continues:

"Before reaching these questions we meet at the threshold of the controversy plaintiff's additional contention that they have not been accorded the hearing which the statute requires. They rightly assert that the granting of that hearing is a prerequisite to the making of a valid order. The statute provides (42 Stat. 159, 166, Sec. 317 U. S. C. 211):

SEC. 310. Whenever after full hearing upon a complaint made as provided in Section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that a rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

* That is, "the proceeding" which resulted in the Secretary's order fixing rates.

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges to be thereafter observed in such case, or the maximum or minimum, to be charged, and what regulation or practice is or will be just, reasonable and non-discriminatory to be thereafter followed; * * *

The allegations as to the failure to give a proper hearing are set forth in Paragraph IV of the bill of complaint, 336 * * *. The allegations in substance are: That separate hearings were not accorded to the respective respondents (plaintiffs here). That at the conclusion of the taking of the testimony before an examiner, a request was made that the examiner prepare a tentative report, which should be subject to oral argument and exceptions, so that a hearing might be had before the Secretary without undue inconvenience to him, but that the request was denied and no tentative report was exhibited to plaintiffs and no oral argument upon the issues presented by the order of inquiry and the evidence was at any time had before the Secretary. That the Secretary, without warrant of law, delegated to acting secretaries the determination of issues with respect to the reasonableness of the rates involved. That when the oral arguments were presented after the original hearing, and after the rehearing, the Secretary was neither sick, absent, nor otherwise disabled, but was at his office in the Department of Agriculture and the appointment of any other person as acting secretary was illegal. That the Secretary at the time he signed the order in question had not personally heard or read any of the evidence presented at any hearing in connection with the proceeding and had not heard or considered oral arguments relating thereto, or briefs submitted on behalf of the plaintiffs, but that the sole information of the Secretary with respect to the proceeding was derived from consultation with employees in the Department of Agriculture out of the presence of the plaintiffs or any of their representatives.

On motion of the government, the district court struck out all the allegations in Paragraph IV of the bill of complaint and the plaintiffs were thus denied opportunity to require an answer to these allegations or to prove the facts alleged.

* * * * *

The outstanding allegation, which the district court struck out, is that the Secretary made the rate order without having heard or read any of the evidence, and without having heard the oral arguments or having read or considered the briefs which the plaintiffs submitted. That the only information which the Secretary had as to the proceeding was what he derived from consultation with employees of the Department.

337 The other allegations of the stricken paragraph do not go to the root of the matter. * * *

1. The essence then of the assertion of failure of the Secretary of Agriculture to give to plaintiffs that full hearing to which they were entitled is that the order under review was made by the Secretary

"without having heard or read any of the evidence and without having heard the oral arguments or having read or considered the briefs which the plaintiffs submitted." That "outstanding allegation" now has been denied. Evidence has been heard. Not only has it not been proved that the Secretary did not read any of the evidence nor hear the oral arguments, nor read and consider the briefs which plaintiffs submitted, but exactly the opposite has been proved. The Secretary did read parts of the transcript of the testimony; he did hear (not with his ears but by reading) the oral arguments, he did read and consider the briefs submitted by plaintiffs. These things have been proved unless indeed we shall reject the testimony of the Secretary of Agriculture as incredible. That alternative, absent a much stronger showing than is here, is not to be thought of in connection with the testimony of an honorable and distinguished head of a great executive department of the federal government.

The Supreme Court has not said that it was the duty of the Secretary of Agriculture to hear or read all the evidence and in addition thereto, to hear the oral arguments and to read and consider briefs. If the Supreme Court had said that it would have meant that the Packers and Stockyards Act cannot be administered. It is entirely impracticable to administer it if it imposes such a duty on the Secretary personally. Consider that in this very case the transcript of the oral testimony fills 13,000 pages. The Exhibits, several hundred, fill more than 1,000 pages. A narrative statement of just a part of the oral testimony fills 500 printed pages. Learned counsel for plaintiffs assert indeed that they do not mean to contend that the Secretary personally must have read all of this mass of testimony. Such a contention could not be maintained. Let it be frankly stated now that the judges of this court, whose duty it was to consider the case *de novo* (since it involved constitutional issues), did not read all this testimony. We think, moreover, that it may be predicted
 338 with some assurance that all this testimony will not be read by the justices of the Supreme Court when, as they must, they consider the cases on the merits.

It is the testimony of the Secretary of Agriculture that he heard the oral argument (by reading it) and that he read the briefs. It is his testimony that he gave consideration to the findings of fact (they were 180 in number and filled more than 100 printed pages). It is his testimony that he examined to some extent even the voluminous transcript of the oral testimony and the exhibits. He had besides the benefit of a discussion of the oral testimony and exhibits by trusted assistants who had read every line and examined each exhibit. That full hearing which the law required did not demand that he should do more. Evidence taken by an examiner, as the evidence here was taken, "may be sifted and analyzing of the evidence by his subordinates." So the Supreme Court has said. How can it be said that the Secretary did not have the benefit of and did not consider the results of a sifting and analyzing of evidence by competent subordinates?

It cannot well be argued to this Court that the findings of fact which were studied by the Secretary do not represent a sifting and analyzing of the evidence by his subordinates. This court has found that those findings not only are supported by some evidence, but also that they are supported by the weight of the evidence. Upon its own independent consideration of the evidence this court arrived at the same findings as those which were reached by subordinates of and by the Secretary. The Secretary, however, had much more than the findings. Other subordinates who had read all the testimony and examined all exhibits, discussed and reviewed the whole evidence with the Secretary.

The Supreme Court's meaning when it said that the evidence might be "sifted and analyzed by competent subordinates" for the Secretary is robbed of all practical significance and value when interpreted as by plaintiff's counsel, who say that evidence cannot be sifted and analyzed unless, as to any controverted issue, the testimony on both sides is set out either in full or in epitome. It seems to us that such an interpretation disregards the true and natural meaning of the words "sifted" and "analyzed." The very purpose of "sifting and analyzing evidence is to extract from it the pure gold of truth—the real and ultimate facts.

330 If, however, testimony is not "sifted" and "analyzed" unless as to any controverted issue the testimony for and against a given conclusion is presented, are plaintiffs in a position to contend that the Secretary did not have the benefit of a summary of the testimony most favorable to plaintiffs? Did not plaintiffs incorporate a summary of the testimony in oral arguments and briefs? The Secretary read a transcript of the oral arguments and he read the briefs. If in them counsel omitted to epitomize the testimony most favorable to their contentions can they challenge the fullness of the hearing on that account? A defendant even in a criminal case scarcely would be heard to challenge either the fairness or fullness of the hearing accorded him, let us say on a motion for a new trial, if he did not so much as direct the attention of the court to the evidence in his favor.

Findings of Fact

As to the issue made by the answer to Paragraph IV of the bill and upon the evidence heard we make the following findings of fact: We find that the Secretary of Agriculture caused to be sent to his private office for his use and consideration in connection with the performance of his function the full transcript of all the testimony taken in the proceeding, together with the exhibits; that he was advised by the Solicitor of the Department of Agriculture that his duty was a personal one and that the order must be his order based on his consideration of the record; that the Secretary personally read and considered a transcript of the whole of the oral argument before

⁷ Hon. Seth Thomas, now United States Circuit Judge in the Eighth Circuit, was then Solicitor of the department. His testimony especially is significant.

the Assistant Secretary and the briefs of the parties (in which oral arguments and briefs were such summaries of the evidence as the parties desired to incorporate therein); that, in addition to his study of oral arguments and briefs, the Secretary studied and considered findings made by competent subordinates in the Department of Agriculture resulting from a sifting and analyzing of all the evidence and that, further, he considered an oral review and discussion of all the evidence by other competent subordinates who personally had read every line of testimony and inspected each exhibit and that he supplemented all of the foregoing by himself reading and considering parts of the transcript of the oral testimony

Conclusion of Law

Based upon the findings of fact we conclude as a matter of law that the Secretary gave plaintiffs that hearing to which the law entitled them.

2. Obviously the only "further proceedings" in this court contemplated by the Supreme Court were such as would be necessary to determine the issue newly to be made following the handing down of the opinion of the Supreme Court. If, however, as is contended by learned counsel for plaintiffs, the cause really has been remanded not for "further proceedings" to "determine whether plaintiffs had a proper hearing" but for a rehearing, then, as to all issues, there has been accorded such a rehearing. We have reached the same conclusions on the merits as to the facts and law as those heretofore announced and we incorporate them herein by reference.

3. Exceptions are allowed to the conclusion of law newly stated here and also to those herein incorporated by reference.

Counsel for defendants will submit for approval and entry an appropriate form of decree dismissing the bills.

In United States District Court

Dissenting opinion

Filed July 2, 1937

VAN VALKENBURGH, Circuit Judge, dissenting:

I am unable to conclude from the testimony at this rehearing that the Secretary of Agriculture gave to the determination of this matter the personal consideration which is his duty under the provision of the Packers and Stockyards Act as construed by the Supreme Court. It is not an impersonal obligation. The proceeding has quality resembling that of a judicial proceeding, in which the one who decides shall be bound to reach his conclusion "uninfluenced by

extraneous considerations which in other fields might have played a part in determining purely executive action." The proceeding is not one of ordinary administration, but looks to legislative action, in which the Secretary is the agent of Congress in the fixing of rates for market agencies. So that, as said by the Supreme Court

the authority conferred by the Act is not given to the Department of Agriculture, as a department in the administrative sense, but to the Secretary himself as the legislative agent of the Congress. That duty "undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred." *Morgan vs. United States*, 298 U. S. 468, 492.

There can be no doubt that, at the time of original trial in this court, it was the theory of the government, as expressed by its counsel, that the authority conferred by paragraph 310 of the Packers and Stockyards Act is given to the Department of Agriculture as a department in the administrative sense. This is apparent from the language of the motion to strike paragraph IV, among other parts of complainants' bill, "for the reason that the allegations contained in said portions of said petition are impertinent, redundant, incompetent, irrelevant, and immaterial to any issue which may properly be raised in this suit." This position was maintained on appeal before the Supreme Court, as appears from the argument of appellees reported in 298 U. S. at pages 469, 471. Counsel expressly referred to the language of this court to the effect "that the theory of these allegations is supported by nothing in the Act and that a construction of the Act inconsistent with that theory would destroy it altogether as a measure capable of practical administration." Counsel added in that presentation that to permit parties affected by "administrative decisions" thus to challenge orders, as signed upon insufficient deliberation, "might well lead to the paralysis of *administrative* tribunals." [Italics supplied.] Obviously no distinction was made between departmental proceedings in an administrative sense, and those of a quasi judicial character.

It is impossible, in my judgment, to read the testimony of the Secretary without recognizing that he carried into the final determination reached this conception of the proceeding as one belonging to his department in an administrative sense. The examinations he made were casual and perfunctory in the extreme. He says his final determination represented his reactions to the findings of the 342 men in the Bureau of Animal Industry. He accepted these findings because he regarded his subordinates as in a better position than himself to make the decision. In his view "the phrase 'Secretary of Agriculture' is perhaps used in connection with regard to laws of this sort in the broad sense as well as in the narrow sense."

While undoubtedly the Secretary may have such assistants to analyze and appraise evidence for his convenience and advice, this does not and should not mean that such appraisal may amount to final valuation, where the responsibility of decision is expressly addressed to the Secretary alone, sitting in a quasi judicial capacity. And this means a moral as well as a legal responsibility where large interests, as here, are critically affected.

The findings accepted by the Secretary emphasize the importance and necessity of this market. If it is to be maintained, those who conduct it must receive a fair and reasonable return upon their serv-

ices. This is true apart from a consideration of the question of confiscation as such. For this reason the conscientious judgment of the Secretary himself apart from his administrative character is demanded as a duty.

Of course the Secretary takes official responsibility when he signs any administrative order prepared by his department, but that is not the quality of responsibility demanded in a proceeding of this nature.

If it be true, as contended, that the Act cannot be administered except upon the superficial basis here disclosed, then legislation should be made to meet that situation. Necessarily I have made but brief reference to record contents in stating these conclusions. In my judgment the recitals of the Secretary as a whole confirm those views.

Being of opinion that the proceedings in this case differed in no substantial respect from those ordinarily involved in departmental administration, and that a serious condition in the life of this market has resulted from the purely casual and mechanical treatment it has received, I must respectfully dissent from the views expressed by my associates.

[File endorsement omitted.]

344

In the United States District Court

[Title omitted.]

In Equity. No. 2328 and Related Cases Nos. 2329-78

Opinion

Filed June 18, 1938

Before VAN VALKENBURGH, Circuit Judge, and REEVES and ORIS,
District Judges

PER CURIAM: The matters for decision are the motion of the defendants for an order staying the distribution of impounded moneys and the motion of petitioners for their distribution. These matters arise in the manner now to be stated.

Under date of June 14, 1933, the Secretary of Agriculture issued an order fixing maximum rates and charges for stockyard services rendered by petitioners at the Kansas City Stockyards in Kansas City, Missouri. By bills filed July 19, 1932, petitioner sought injunctive relief against enforcement of that order. This Court (July 22, 1933) temporarily restrained its enforcement upon the following condition imposed in each of the companion cases—

“that the petitioner shall deposit with the Clerk of this Court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect and pending final disposition of this cause, the full amount by which the charges collected under the Schedule of Rates in effect exceeds the amount which would have been collected under the rates prescribed in the Order of the Secretary, together with a verified statement of the names and

addresses of all persons upon whose behalf such amounts are collected by petitioner."

By agreement of counsel the temporary restraining orders, so conditioned, were continued in effect pending final hearing. Decrees dismissing the bills were entered December 20, 1934. (See this case, 8 F. Supp. 766.) Petitioners appealed. The Supreme Court, on May 25, 1936, reversed the decrees and remanded the cases for a determination of the question whether the Secretary had accorded petitioners "a full hearing" as required by law. 298 U. S. 468. After the remand and a presentation anew of all issues, this court held that petitioners had been accorded the hearing required by law and again entered decrees dismissing the bills (July 9, 1937). Petitioners again appealed. The Supreme Court, on April 25, 1938 (— U. S. —), reversed outright the decrees of this Court on the ground that the Secretary had not accorded the petitioners the "full hearing" required by law. On May 31, 1938, a petition for rehearing was denied and the cases remanded for further proceedings in accordance with the opinion of the Supreme Court. Pursuant to the mandate of the Supreme Court, this Court now has entered its final decrees setting aside the decrees of July 9, 1937, and permanently enjoining the enforcement of the Secretary's order of June 14, 1933.

The Clerk of this Court has in his custody sums aggregating \$586,093.32, paid to him by petitioners in accordance with the condition upon which restraining orders were issued, as above set out. Petitioners ask that the sums so deposited be returned to them. Defendants move that the distribution of the moneys be stayed until the termination of such litigation, if any, as shall follow an order the Secretary may make hereafter after he has accorded petitioners such a hearing as is required by law (which now he offers to do), in which order he will prescribe the maximum rates and charges for stockyard services rendered by petitioners, the order to be retroactively effective as of and from June 14, 1933.

1. We consider that the motion of defendants has not the faintest shadow of merit. The Supreme Court twice has said that the order of June 14, 1933, was invalid. Pursuant to the mandate of the Supreme Court this court permanently has enjoined enforcement of that order and has dissolved the restraining orders heretofore issued. The fund in the Clerk's custody belongs to petitioners.

It was deposited by them as security that if the Secretary's order of June 14, 1933, should be held valid those from who excess charges had been collected would be reimbursed. The fund was deposited upon the clear understanding that if the order should be held invalid and its enforcement enjoined the fund would be returned to petitioners. The orders under which the fund was accumulated are susceptible of no other interpretation.

If this Court did not now order the return to the petitioners of the moneys deposited by them the Court itself would be guilty of bad faith. The petitioners deposited the moneys on the understanding and as-

insurance that the fund so created would be returned if the Secretary's order were held invalid. The order has been held invalid and its enforcement enjoined.

2. We do not consider that the Secretary's contention that he now can make an order prescribing rates and charges which shall be effective as of June 14, 1933, and which shall supersede rates and charges lawfully in effect then and thereafter has any shred of reason or law to support it. It is directly opposed to the very words of the Act authorizing the Secretary to prescribe rates and charges. The language of the Act is that the rates and charges the Secretary is authorized to prescribe shall be determined and prescribed
348 "after full hearing" (and there has been no such hearing), and that when they have been so determined and prescribed they shall be thereafter observed."

Defendants' Motion for an Order Staying Distribution of Impounded Moneys is overruled. It is so ordered. An exception is allowed to defendants.

The motion (styled petition) of petitioners (styled plaintiffs) for an Order of Distribution is sustained in an order filed contemporaneously herewith. To that order defendants are allowed an exception.

ARBA S. VAN VALKENBURGH,
United States Circuit Judge.

ALBERT L. REEVES,
United States District Judge.

MERRILL E. OTIS,
United States District Judge.

Filed in the United States District Court June 18, 1938.

349 [Clerk's Certificate to foregoing transcript omitted in printing.]

350 In the Supreme Court of the United States
October Term, 1938

No. 221

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE,
APPELLANTS

v.

F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN SHEEP COMMISSION
COMPANY, ET AL., APPELLEES

On appeal from the District Court of the United States for the
Western District of Missouri

*Statement of points on which appellants intend to rely and of parts
of record necessary for consideration thereof*

Filed July 27, 1938

The appellants state that the points on which they intend to rely are the following:

1. The Court erred in denying defendants' motion requesting the Court to enter an order staying all further proceedings herein and to direct the Clerk of said District Court to retain in his custody the moneys impounded in said Court pursuant to its interlocutory order of July 22, 1933, and continued in effect from time to time thereafter, by further orders of the Court, until such time as the Secretary of Agriculture proceeding with due expedition shall have entered a final order in the proceeding reopened by him by an order dated June 1, 1938, and such final order shall have become effective or its merits have been finally adjudicated by a court of competent jurisdiction.

351 2. The Court erred in granting petitioners' motion for restitution of all impounded funds theretofore deposited by them with the Clerk of said Court between July 22, 1933, and November 1, 1937, pursuant to the terms of a temporary restraining order issued by the said Court on July 22, 1933, and extended from time to time thereafter.

3. The Court erred in holding that as a matter of law the funds now impounded in the custody of the Clerk belong to petitioners.

4. The Court erred in holding that the said funds were deposited with the said Clerk upon the clear understanding that if the order of the Secretary, dated June 14, 1933, should be held invalid and its enforcement enjoined the said funds would be returned to petitioners.

5. The Court erred in holding that as a matter of law the Secretary of Agriculture has no authority in the circumstances of this case to make an order, effective as of June 14, 1933, which will determine reasonable rates and charges for the period between July 24, 1933, and November 1, 1937.

6. The Court erred in directing the distribution to petitioner of the said impounded moneys prior to a determination upon the merits by the Secretary of Agriculture or by the Court of the ultimate ownership of said moneys.

7. The Court erred in directing the distribution to petitioners of the said moneys now impounded in the custody of the Clerk prior to any determination upon the merits by the Secretary of Agriculture or by the Court of the reasonableness of the rates and charges under which the said moneys were collected by petitioners from their patrons.

8. The Court erred in failing to hold that the funds now impounded in the custody of the Clerk should be retained in the
352 custody of the said Clerk until such time as the Secretary of Agriculture, acting with due expedition, shall have made a final order, dated as of June 14, 1933, fixing the reasonable rates and charges to be charged by the petitioners for the period between July 24, 1933, and November 1, 1937.

9. The Court erred in failing to enter such order or orders with respect to the impounded funds as was and is consistent with right and justice and the laws of the United States.

The appellants state that the following parts of the record are necessary for the consideration of the aforesaid points, and therefore designate them as parts of the record to be printed by the Clerk of the Supreme Court of the United States:

1. Petition filed by F. O. Morgan, doing business as F. O. Morgan Sheep-Commission Company, in the United States District Court for the Western District of Missouri on July 19, 1933;
2. Defendants' answer to said petition, dated November 25, 1933;
3. Statement as to petitions filed in cases Nos. 2329 to 2378, inclusive;
4. Opinions, findings of fact, and conclusions of law of the said District Court, dated October 29, 1934;
5. Decree of the said District Court, dated December 20, 1934;
6. Petition for rehearing filed in the said District Court;
7. Order, dated January 2, 1935, granting leave to file petition for rehearing;
8. Opinion of the said District Court, dated June 20, 1935, on petition for rehearing;
9. Stipulation, dated June 15, 1935, as to consolidation of causes;
10. Order, dated June 15, 1935, consolidating causes;
- 353 11. Mandate of the Supreme Court of the United States, dated May 25, 1936;
12. Supplemental answer of defendants, dated July 11, 1936;
13. Amended application of petitioners for leave to amend petitions, dated September 17, 1936;
14. Order, dated November 6, 1936, granting leave to amend petitions;
15. Defendants' answer, dated December 4, 1936, to petitions as amended;
16. Opinions of the said District Court, dated July 2, 1937;
17. Decree of the District Court dated July 9, 1937;
18. Temporary restraining order dated July 22, 1933;
19. Order dated September 19, 1933, continuing temporary restraining order;
20. Order dated June 20, 1935, denying petitions for rehearing and entering joint and final decree in cases as consolidated;
21. Order dated August 16, 1937, continuing temporary restraining order and staying operation of order of Secretary of Agriculture dated June 14, 1933, pending appeal to the Supreme Court of the United States from the said District Court's decree of July 9, 1937;
22. Mandate of the Supreme Court of the United States dated June 3, 1938;
23. Defendants' motion dated June 11, 1938, for an order staying further proceedings in the above-entitled cause and requesting the retention by the Clerk of the said District Court of moneys impounded in said Court pursuant to its interlocutory order of July 22, 1933, continued from time to time thereafter by further
- 354 orders of the said Court, until such time as the Secretary proceeding with due expedition shall have entered a final order in

the proceeding reopened by him by order of June 1, 1938, and such order shall have become effective or its merits have been finally adjudicated by a court of competent jurisdiction;

24. Petitioners' reply to defendants' aforesaid motion;

25. Answer of New Amsterdam Casualty Company, substituted for Harry J. Kennaley, to defendants' aforesaid motion;

26. Petitioners' motion dated June 11, 1938, for the restitution of all impounded funds theretofore deposited by them with the Clerk of this Court between July 22, 1933, and November 1, 1937, pursuant to the terms of a temporary restraining order issued by this Court on July 22, 1933, and extended from time to time thereafter;

27. Opinion entered in the said District Court on June 18, 1938, by Circuit Judge Arba S. Van Valkenburgh and District Judges Albert L. Reeves and Merrill E. Otis;

28. Final order and decree entered by said District Court on June 18, 1938;

29. Final decree of said District Court dated June 18, 1938, setting aside its former decree of July 9, 1937, and permanently enjoining the order of the Secretary of Agriculture dated June 14, 1933;

30. Defendants' petition for appeal to the Supreme Court of the United States;

31. Said District Court's order allowing appeal to the Supreme Court of the United States;

32. Defendants' assignment of errors filed with said petition for appeal;

33. Notice of appeal to Roy McKittrick, Attorney General of the State of Missouri;

34. Defendants' praecipe for record on appeal and acknowledgment of service thereon;

35. Citation and writ of service;

36. Any orders of this Court subsequent to the filing of the aforesaid mandate of the Supreme Court of the United States not herein enumerated.

N. A. TOWNSEND,
Acting Solicitor General.

This 16 day of July 1938.

The undersigned hereby acknowledge service of a copy of the foregoing statement of points to be relied on and parts of the record to be printed.

July 26, 1938.

FREDERICK H. WOOD,
JOHN B. GAGE,
Counsel for Appellees.

In the Supreme Court of the United States

October Term, 1938

No. 221

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE,
APPELLANTS

vs.

F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN SHEEP COMMISSION
COMPANY, ET AL., APPELLEES*Designation of parts of transcript of record to be printed, in addition
to parts designated by appellants*

Filed July 27, 1938

"Exhibit No. 24 offered by appellees in the administrative proceedings, being copy of Arbitrators' Award in Dockets 11, 12, 13, and 14."

Appellees object to the printing of the following portions of the transcript of record designated by appellants, and respectfully request that the cost of printing the same and the Clerk's costs be assessed against appellants for unnecessarily requiring them to be made part of the transcript of record and printed:

1. Opinions, findings of fact, and conclusions of law of the said District Court, dated October 29, 1934.
 2. Petition for rehearing filed in the said District Court.
 3. Order, dated January 2, 1935, granting leave to file petition for rehearing.
 4. Opinion of the said District Court, dated June 20, 1935, on petition for rehearing.
 5. Opinions of the said District Court, dated July 2, 1937.
- Dated July 27, 1938:

FREDERICK H. WOOD:

JOHN B. GAGE,

THOMAS T. COOKE

Attorneys for Appellees.

The undersigned hereby acknowledges service this 27 day of July, 1938, of a copy of the foregoing counter-designation and objections.

N. A. TOWNSEND,

Acting Solicitor General.

[Endorsement on cover:] File No. 42706. W. Missouri, D. C. U. S. Term No. 221. The United States of America and the Secretary of Agriculture, Appellants, vs. F. O. Morgan, Doing Business as F. O. Morgan Sheep Commission Company, et al. Filed July 25, 1938. Term No. 221 O. T. 1938.

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